

**RETHINKING CIVIL JUSTICE:
RESEARCH STUDIES FOR
THE CIVIL JUSTICE REVIEW**

ONTARIO LAW REFORM COMMISSION

VOLUME 2



Ontario

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The Ontario Law Reform Commission was established by the Ontario Government in 1964 as an independent legal research institute. It was the first Law Reform Commission to be created in the Commonwealth. It recommends reform in statute law, common law, jurisprudence, judicial and quasi-judicial procedures, and in issues dealing with the administration of justice in Ontario.

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**Ontario
Law Reform
Commission**

The Honourable Charles Harnick
Attorney General for Ontario

Dear Attorney:

I have the honour to submit our study papers on civil justice entitled
Rethinking Civil Justice: Research Studies for the Civil Justice Review.

A handwritten signature in black ink, which appears to read "John D. McCamus".

December, 1996

John D. McCamus
Chair

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ENHANCING THE PERFORMANCE OF THE COURT SYSTEM

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FUNDAMENTAL REFORMS TO CIVIL LITIGATION

KENT ROACH

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FUNDAMENTAL REFORMS TO CIVIL LITIGATION

KENT ROACH

1. INTRODUCTION

The purpose of this paper is to assess whether fundamental reforms can be made to civil litigation in the Ontario Court (General Division) to reduce delay and costs for both the state and the citizens, improve the quality of decision-making and enhance access to justice. These goals are taken from the mandate of the Ontario Civil Justice Review, a project that has commissioned this paper. The goals of cost and delay reduction, better quality decisions and access to justice are different, and at times, conflicting goals and any proposed change will have to be assessed with respect to each separate goal. Nevertheless, it should not be assumed that these objectives are always in conflict. De-emphasizing hourly billing in the costing of legal services and indemnities may increase access to justice and decrease cost and delay without compromising the quality of decision-making if hourly billing is contributing to procedures that are not necessary to decide cases fairly on the merits. Procedures that do not require oral testimony have the potential to decrease delay and costs and increase access to justice while not decreasing the quality of decision-making in the form of authoritative public interpretation of documents such as constitutions, statutes, wills and contracts. Case management is an attractive strategy because it holds out the potential to reduce delay and costs and by doing so increase access to justice and the quality of decision-making.

(a) METHODOLOGY

Litigation will be examined in this paper in the context of what is known about the landscape of disputes in Ontario society. This approach is important because the vast majority of people with grievances never contact lawyers and the vast majority of the minority who do initiate legal action never receive formal adjudication because their cases are not defended, discontinued or settled. Opportunities for saving resources lie at the margin of those comparatively few cases that go forward. Nevertheless, an appreciation of the disputes that never reach any stage of litigation is crucial if unrealized and unsatisfied demand and its implications for access to justice are to be understood.

It is impossible to address reforms to the procedures and costs of litigation without exploring the purposes of litigation. Much of this discussion will draw on an important debate about whether the primary purpose of civil litigation is to resolve disputes and achieve corrective justice between a single plaintiff and defendant or whether it is to produce public law to order the behaviour of groups and organizations.¹ Traditionally, civil adjudication has been associated with the aim of achieving corrective justice between individuals. The focus is on establishing adjudicative facts of what happened and who caused it to happen. The parties are assumed to be competent and motivated to achieve this task and the judge plays a passive

¹ See for example Owen Fiss "Coda" (1988) 38 U.T.L.J. 229; Ernest Weinrib "Adjudication and Public Values: Fiss's Critique of Corrective Justice" (1989) 39 U.T.L.J. 1.; Kent Roach "Teaching Procedures: The Fiss/Weinrib Debate in Practice" (1991) 41 U.T.L.J. 247.

role. Some argue that corrective justice lies at the core of the adjudicative function and warn that courts, as opposed to the legislature and the executive, are ill-suited to handling complex claims that go beyond the bi-polar model.²

In contrast, others argue that much modern litigation is based not on an attempt to correct past wrongs between individuals but rather to order behaviour in the future for groups and organizations.³ The wider effects of public law litigation means that bi-polar party structure is less typical, but even when there are only two parties, the stakes are usually broader and focused on the public dimensions of the law. Public law adjudication relies less on the private initiative of the parties in determining adjudicative facts and more on the role of the judge in managing complex litigation and interpreting and applying legislation and other legal texts. Despite its name, public law adjudication includes not only statutory and constitutional cases but family law, commercial and bankruptcy law.⁴ Any case has a public dimension to the extent that it can resolve more than one dispute. This includes not only cases with multiple parties and multiple claims, but even simpler disputes that may serve as precedents for resolving other disputes.⁵

The competing models of corrective justice and public law adjudication are deeply embedded in the structure of civil litigation. They are reflected in the competing traditions of common law and equity and adversarial and inquisitorial models of judging. Corrective justice presumes simple bi-polar disputes as opposed to complex cases with multiple parties and claims. It also favours the use of actions culminating in the continuous oral trial to determine disputed adjudicative facts as opposed to applications based on affidavits and the interpretation of written documents. This important theoretical debate will be engaged at various junctures in this paper. I will suggest that while it is premature to argue that the superior courts should never resolve disputes that are only important to the private parties, litigants and judges should be encouraged to concern themselves with resolving disputed issues of law for the benefit of the public at large. By aggregating disputes so that one case resolves more than one individual claim, public law adjudication has the potential to allow the civil justice system to operate more efficiently; increase access to justice for the groups affected by litigation and to reach decisions that are better because they are designed to benefit the public as well as the parties.

² Ernest Weinrib *The Idea of Private Law* (Cambridge: Harvard University Press, 1995); Stephen Subrin "How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective" (1987) 135 U.Penn.L.Rev.909; Patrick Glenn "Class Actions In Ontario and Quebec" (1984) 62 Can.Bar Rev. 247.

³ Kenneth Scott "Two Models of the Civil Process" (1975) 27 Stan.L.Rev. 937; Abram Chayes "The Role of the Judge in Public Law Litigation" (1976) 89 Harv.L.Rev. 1281; Bruce Wildsmith "An American Model of Civil Process in a Canadian Landscape" (1980) 6 Dal.L.J. 71.

⁴ Eisenberg and Yeazell "The Ordinary and Extraordinary in Institutional Litigation" (1980) 92 Harv. L.Rev 465; Conklin and Morrison "Public Issues in a Private Law World: The Appointment of a Receiver as a Case Study" (1988) 26 Osgoode Hall L.J. 45.

⁵ George Priest has emphasized the public role that individual cases can serve in providing precedents which allow the vast majority of disputes to be settled without adjudication. Priest and Klein "The Selection of Disputes for Litigation" (1984) 13 J.Legal Studies 1; Priest "Channelling Civil Litigation: A Comment on Civil Justice Reform in Ontario" in Ontario Law Reform Commission *Study Paper on Prospects for Civil Justice* (1995) at pp.243-246. See also William Landes and Richard Posner "Legal Precedent: A Theoretical and Empirical Analysis" (1976) 19 J.Law & Econ. 249.

At the same time, however, aggregation may make individual cases more complex, lengthy and more resistant to settlement.

Civil litigation will be examined in this paper from a process perspective that is concerned with all the stages of civil litigation including the important role of default judgments and settlements.⁶ Case management attempts to schedule and manage the initial stages of civil litigation including the securing of default judgments, the completion of pleadings, discovery and interlocutory motions and pre-trial conferences. Each stage of civil litigation is amenable to different reforms, but all are connected in some way. For example, the costing of legal fees and indemnities in terms of hourly billing may affect the conduct of all stages of litigation. The fairness of summary judgments or summary trials may depend on the availability of discovery. The length and scope of discovery will in turn be affected by pleading rules and practices, legal fees and schedules provided under case management. Attempts to shorten schedules or restrict discovery may only generate more interlocutory motions. In this paper, I will attempt to identify those phases of the civil litigation process most amenable to reform while also exploring the likely effects that reforms in one phase may have on another. In the United States, most attention has been paid to discovery reforms. This is not the only area for reform and is, in any event, connected with pleading and cost rules, the use of motions, the assumption of a continuous oral trial and the promotion of settlement.

In addition to examining litigation in the context of the landscape of disputes, the purposes of adjudication and the different stages of the litigation process, this paper will also make a distinction between legal rules and legal cultures as represented by the practices and attitudes of the bar, court administrators and the judiciary.⁷ Although legal culture is intangible and may vary from locality to locality⁸, it is an important variable that interacts with the formal rules which attempt to govern the conduct and pace of litigation. The last decade has seen

⁶ Allan Hutchinson "The Formal and Informal Schemes of the Civil Justice System: A Legal Symbiosis Explored" (1981) 19 Osgoode Hall L.J. 473; Marc Galanter "Reading the Landscape of Disputes: What we Know and Don't Know About Our Allegedly Contentious and Litigious Society" (1983) 31 U.C.L.A. L.Rev. 4; Barbara Holman "Pace and Pattern of Civil Litigation Prior to Placement on the Trial List: An Empirical Study of the Niagara North County Court and Discussion of Ontario's Reformed Rules of Civil Procedure" (1986) 6 Windsor Y.B. Access to Justice 194 at 211.

⁷ The importance of legal culture has been widely recognized. After an examination of delay in several courts, Thomas Church concluded that rather than procedural or structural changes "the most important, and the most difficult, change a court should make is the long-term expectations and practices of civil attorneys practising in the court." *Justice Delayed* (Williamsburg: National Centre for State Courts, 1978) at p.192. In 1984, an American Bar Association Commission to Reduce Court Costs and Delay picked up this idea and warned: "What lawyers and judges want, will tolerate or resist in the litigation process can subtly change the contours of every procedural innovation introduced and can effectively predetermine their success or failure. Lasting reforms require bar and bench commitment not only to the theoretical goals of reducing delay and cost to litigants, but also to the inconveniences or disruptions that reforms may entail for their customary way of doing business." quoted with approval in The Report of the Justice Reform Committee, E.N. Hughes chair *Access to Justice* (Victoria: Queens Printer, 1988) at p.3. See also David Sherwood and Mark Clarke "Toward an Understanding of 'Local Legal Culture'" (1981) 6 The Justice System Journal 208.

⁸ The provincial average of civil cases that have been pending on trial lists for over a year is 57%, but a regional breakdown reveals a low of 7% in the north west, 22% and 23% in the central south and central west regions and a high of 67% and 64% in the south west and Toronto respectively. Civil Justice Review *First Report* March, 1995 at p.58. Demand for court services may partially explain these differences, but local legal culture probably also plays a role. An important concern in Ontario is to what extent reforms targeted at the local legal culture of the greater Toronto area are appropriate in other parts of the province.

fundamental changes to the rules of civil procedure and court structure which were designed to encourage greater efficiency in litigation. Nevertheless, during this period the number of cases pending has steadily increased. A reading of the rules of civil procedure alone would suggest that litigants should be able to determine the merits of their dispute in a speedy and economical fashion and that judges have ample resources to penalize a litigant or lawyer who is tardy or otherwise unnecessarily delays litigation or increases its costs. However, since the advent of sociological and realist approaches to legal studies, we have recognized that the rules on the books are mediated by the attitudes and practices of the bar and bench.

The Civil Justice Review must be concerned not only about changing the formal rules that govern civil litigation, but also the working assumptions and expectations of the bar and the bench. Case management changes the rules and procedures of litigation but, at a more profound level, also attempts to change legal culture as represented in the working patterns of the bar and the bench.⁹ Increased specialization in the courts would promote the recognition and enhancement of distinct legal cultures as well as the creation of specialized rules. In addition, the time and money spent in litigation depends in no small part on the ability and inclination of the opposing party to utilize its procedural options by, for example, bringing pre-trial motions or seeking wide-ranging discovery. Judicial attitudes may be crucial in determining whether existing rules providing for summary judgments, disciplinary cost awards and the prohibition of frivolous motions are actually used to speed up litigation. Despite the intangible nature of legal culture, it must be considered if present or proposed reforms are to have their intended impact.

(b) OUTLINE

This paper will commence with an examination of available data about the landscape of disputes in Ontario and the present use of courts in Ontario. Emphasis will be placed on the dynamic nature of both disputes and court usage and examples will be given of recent developments that affect both the demand for litigation and the use of courts.

The next part will examine some of the factors that may affect the decision to commence proceedings with an emphasis on costs both in terms of the payment of lawyer's fees and cost indemnities following an official adjudication of a motion or case. Attention will also be paid to the prospects of developing costs to the court or user fees which require the parties to pay more of the costs of some proceedings. This section will also briefly examine limitation periods as a factor affecting the commencement of proceedings.

The next section will examine the aggregation of disputes so that one lawsuit is used to resolve multiple claims or affects multiple parties. Much of this discussion will revolve around the competing models of corrective justice and public law litigation. The use of public interest standing, class actions and preclusion by previous litigation in order to encourage the aggregation of claims will also be assessed. In addition, available data on the disposition times

⁹ There is a danger that changes in legal culture will only be measured in terms of attitudes as opposed to actual results. One recent evaluation of Ontario's case management pilot projects contains the following extraordinary statement: "the single most important by-product of the case management system and the one that is not easily quantified are the numbers of believers in the case management program. Whether the numbers support the final conclusions or not, it is vital that the program's success be measured by whether the people who were hopefuls had actually become believers in the system." Quindecia Corporation *Justice In Ontario: A Change of Pace* October 1994 at p.8 of executive summary (emphasis added).

and settlement rates of cases made more complex by multiple claims and multiple parties will be reviewed with a view to determining the costs as well as the benefits of aggregating disputes in a single lawsuit.

The different means of determining the facts in civil litigation will next be examined with an emphasis on procedures that can stream-line the fact-finding process. These include application procedures which rely on written affidavits as opposed to *viva voce* evidence after full discovery as well as stated questions of law and summary judgments. Summary trials in which disputed issues of fact can be decided on the basis of affidavits and cross-examinations on affidavits as used in British Columbia and Manitoba will also be examined. The case law will be examined to understand how legal culture and judicial attitudes may have affected the use of these procedures.

The paper will then examine a variety of interventions often lumped together under the rubric of case management. An attempt will be made to identify those interventions which are mostly likely to be successful in reducing costs and delay. Some case management interventions pose the danger of increasing the expenditure of public and party resources by requiring additional steps in litigation and the devotion of public resources in areas traditionally dependent on the private initiative of the parties and their lawyers. Other interventions are less costly and simply require the parties and the courts to monitor cases more closely as they progress to trial or are disposed by other means. Case management will also be examined in the context of reforms to simplify discovery and minimize motions.

Finally, the role of specialization within courts and the use of appellate courts will be briefly examined with an emphasis on how various interventions may contribute to settlement rates. The conclusion will outline some themes that have emerged connecting the various topics examined in the paper. I will also outline future directions for research and summarize the recommendations that can be made given the present state of knowledge.

2. THE LANDSCAPE OF DISPUTES AND THE PRESENT USE OF COURTS

(a) THE LANDSCAPE OF DISPUTES

The best available data on the landscape of disputes in Ontario is an 1988 telephone survey of over 3,000 households who were asked about whether they had serious problems involving more than \$1000 in the last three years. The most frequently reported problem (11.2% of the households) was automobile accidents with the average amount in dispute being just over \$8,000 and the median amount \$2,500.¹⁰ Given this finding, it is not surprising that legislative restriction of litigation over automobile accidents in 1990 led to a significant decrease in the commencement of civil suits.

On the other hand, the second leading category of reported problems (affecting 9.3% of households) involved various forms of discrimination in terms of employment, schooling and housing. Many of these disputes could not be litigated directly in the Ontario Court (General Division) but would have to be determined through a complaint, investigation and adjudication

¹⁰ W.A. Bogart and Neil Vidmar "Problems and Experience with the Ontario Civil Justice System: An Empirical Assessment" in A. Hutchinson *Access to Justice* (Toronto: Carswell, 1990) at p.9 Table 3.1.

by the Ontario Human Rights Commission or its federal equivalent.¹¹ Reported discrimination problems were also characterized with the lowest level of claims being made and success when claims were made.¹²

The prevalence of disputes related to either automobile accidents or discrimination suggests that many disputes in Ontario society are amenable to intervention. For example in 1990 restrictions were placed on litigation over automobile accidents¹³ and recent proposals have suggested a fundamental restructuring of the role of the Ontario Human Rights Commission in resolving disputes about discrimination.¹⁴

Other reported problems of note among households in the 1988 survey include those with governments (8% of households); consumer problems (7.9% of households with a median amount of \$2000); debt problems (4.7% of households with most being for collecting money owed), landlord problems (3% of households), and divorce/separation problems accounting for 2.4% of households.¹⁵ These figures when compared with actual court usage indicate that some problems are significantly over and under-represented in the litigation mix. Although debt problems affected under 5% of households, they account for 37.4% of civil cases commenced and 18% of trials.¹⁶ One reason for this is that the household survey did not survey corporations who are the plaintiffs in most collection cases. Nevertheless, debt and

¹¹ Following the Supreme Court's decision in *Bhadauria v. Seneca College* (1981) 124 D.L.R.(3d) 193 (S.C.C.) which held that there was no common law or statutory tort of discrimination because of the provision of a comprehensive administrative dispute resolution mechanism in the Ontario Human Rights Code. However, a little under half of reported discrimination problems arose through job promotion or loss or unjust dismissal and might have been actionable in the superior courts through wrongful dismissal claims. Nevertheless, there is reason to believe that many of these disputes are not litigated. In a study of over 2000 cases commenced in Ontario from 1973/74 to 1993/94, wrongful dismissal claims (many of which would not be based on discrimination) accounted for only 2.9% of all cases. John Twohig "Empirical Analyses of Civil Cases Commenced and Claims Tried in Toronto, 1973-1994" 07/06/95 prepared for the Civil Justice Review at p.43.

¹² W.A. Bogart and N.Vidmar "Problems and Experience with the Ontario Civil Justice System" *supra* at pp.23-24. A similar American study also found 14% of respondents reported discrimination problems but that there was a low rate of grievance over these problems. Richard Miller and Austin Sarat "Grievances, Claims and Disputes: Assessing the Adversary Culture" (1980-81) 15 Law and Society 525.

¹³ *Insurance Act*, R.S.O. 1990 c.I.8 s.226; *Meyer v. Betel* (1993) 15 O.R.(3d) 129 (C.A.).

¹⁴ Ontario Human Rights Code Review Task Force (M. Cornish, Chair) *Achieving Equality: A Report on Human Rights Reform* (Toronto: Queens Printer, 1992). The Cornish report advocated the establishment of a new tribunal to hear complaints and clinics to represent complainants. Given present fiscal restraints, her proposals are not likely to be implemented. Cornish rejected proposals to allow discrimination claims to be directly litigated in the Ontario Court (General Division) because of concerns about access to justice and the expertise of courts in these matters. Nevertheless, such an approach may be seen as a less costly means to respond to dissatisfaction with the current system. If complainants can find the means to litigate human rights claims, this could significantly increase cases in the Ontario Court (General Division).

¹⁵ Bogart and Vidmar reported that "85% of persons with divorce or separation problems used the services of a lawyer. This is perhaps not surprising, at least when the problem involves divorce, since it is necessary to have a court decree to obtain it, and this fact may prompt individuals to use lawyers....In contrast, people use lawyers much less often for government problems (9%) and for problems with discrimination (17%)." "Problems and Experience with the Ontario Civil Justice System" at pp.24-25.

¹⁶ J. Twohig, C. Baar, A. Meyers and A.M. Predko, "Empirical Analyses of Civil Cases Commenced and Cases Tried in Toronto, 1973-1994", *supra*, at 113. The number of these cases has been declining over this period. In 1988-89, collection cases accounted for 30.1% of cases commenced and 13.7% of cases tried, *supra*, at 114.

collection problems are significantly over-represented in the number of cases commenced and tried in Ontario courts as compared to their incidence in Ontario society. Thus public resources devoted to processing and hearing cases in the superior courts constitute a significant subsidy to the debt collection efforts of corporations. Although they affected over 11% of households surveyed, motor vehicle problems have also been over-represented in the litigation mix because they account for 21.4% of cases commenced and 32.2% of all trials from 1973-1994.¹⁷ Again, this results in a public subsidy to insurance companies as they litigate over automobile accidents. Divorce/separation problems have also been over-represented in cases that go to court but have declined dramatically with legislation which no longer requires that separation be proven before a judge.¹⁸ Other types of problems, notably discrimination problems, rarely get to court.

These findings suggest that Ontario courts have been more receptive to some claims, notably collection and motor vehicle claims, than others. Partly because of reliance on human rights commissions, many potential discrimination claims are not heard by the courts. At the same time, however, it would be a mistake to take problems reported in the household survey as an accurate or unproblematic baseline because the researchers found that better educated, urban households were more likely to report problems and that lower income earners and the elderly were less inclined to report problems. Genuine access to justice reform would address those who may have a legitimate grievance but have not yet reached the stage of naming and blaming, let alone claiming.¹⁹ Nevertheless, the 1988 household survey remains a valuable snapshot of the range and prevalence of disputes in Ontario society and one that should be replicated at regular intervals to determine some baseline for determining which disputes are resolved in courts and which are not.

(b) COURT USAGE

The last few years have witnessed some noticeable trends in claims filed and usage of the Ontario Court (General Division). The most noticeable change has been with respect to statements of claim filed in relation to motor vehicle accidents after the introduction of no-fault automobile insurance legislation in 1990. In 1989/90, 35,874 statement of claims were filed in relation to motor vehicle accidents accounting for over 30% of all statements of claims filed.²⁰ This number declined steadily so that in 1993/94, only 3,651 statements of claims were filed in relation to motor vehicle accidents. It is possible that a greater percentage of the smaller number of more recent automobile accidents claims will go to trial because of the increased severity of the accidents and uncertainty surrounding the implementation of the legislation. Nevertheless, the introduction of no-fault elements with respect to motor vehicle accidents has

¹⁷ *Ibid.*, at p. 45. The percentage of cases involving motor vehicles has been steadily declining over this period. In 1988/89, the year of the household survey, 31.5% of cases commenced and 23.6% of trials involved motor vehicles. *ibid.* at p. 47.

¹⁸ *Ibid.*, at pp. 20-22.

¹⁹ William Felstiner et al. "The Emergence and Transformation of Disputes: Naming, Blaming and Claiming" (1980-81) 15 *Law and Society* 631.

²⁰ Ministry of the Attorney General *Court Statistics Annual Report 1993/94* Provincial Summary at p. 9.

decreased a major demand on the resources of the Ontario Court (General Division).²¹ The legislation was amended in 1993 to increase access to the courts in relation to automobile accidents and a corresponding increase in such litigation has been predicted.²²

Demand in the family law and divorce area, unlike the automobile accident area, has remained relatively constant with about 30,000 divorce petitions filed each year from 1989 to 1994. The number of divorce trials has decreased from over 10,000 in 1989/90 to just over 1,000 in 1993/94 while the number of cases pending has also decreased.²³ This reflects legal changes which no longer require separation to be proven before a judge. It may also reflect more settlements. Increased settlement in these cases eases the burden on the courts but could potentially decrease access to justice and the quality of decision-making.²⁴ The number of statements of claims filed under the *Family Law Act* and the *Children's Law Reform Act* has remained fairly constant at 3,000 during this time period but the number of applications filed under these Acts has increased from 4,712 in 1989/90 to 7,114 in 1993/94. As will be examined below, applications which do not require full discovery or *viva voce* evidence are likely a less expensive means of proceedings both for the public and the parties. The most dramatic change in the family law area has been in motions filed and heard which have risen from about 13,000 in 1989/90 to about 30,000 in 1993/94. Similarly motions filed in other areas have more than doubled to about 95,000 in that time period.

From 1989/90 to 1993/94, the number of statements of claims has decreased significantly not only because of the above noted reduction in automobile accident claims but also because of significant reductions in other claims. Other claims peaked in 1991/92 at 107,518 and declined to 57,227 in 1993/94.²⁵ In addition, since the peak of 1991/92, there have been marked declines in both the number of cases being added to trial lists and the number of cases being disposed or settled at trial.²⁶ This is an important development, but one that is open to various interpretations.

The decline in proceedings initiated and cases added and disposed from trial lists can be seen as a positive development that should reduce strain on court resources and backlog. On the other hand, it may represent a response by potential litigants who have decided that litigation in the Ontario Court (General Division) was simply too slow and expensive. The claims may have been abandoned, settled or diverted to private providers of dispute resolution. There is some evidence to suggest that litigants with backlogged cases that have been pending

²¹ Most motor vehicle claims, like most other claims, will not go to trial. Nevertheless in 1973-74, motor vehicle cases accounted for 56.7% of trials. In 1993/94, however, motor vehicle claims only accounted for 21% of trials. Twohig, Baar, Meyers and Predko, "Empirical Analyses of Civil Cases Commenced and Cases Tried in Toronto, 1973-1994", *supra*, at 114.

²² Civil Justice Review *First Report* March, 1995 at p.62.

²³ *Court Statistics Annual Report 1993/94* Provincial Summary

²⁴ Martha Shaffer "Divorce Mediation: A Feminist Perspective" (1988) 46 U.T.Fac.L.Rev. 349.

²⁵ *Court Statistics Annual Report 1993/94* Provincial Summary

²⁶ Civil Justice Review *First Report* March, 1995 at p.66.

trial for a long period of time are abandoning or settling their cases.²⁷ Not enough is known about party satisfaction with claims that are diverted from the courts because of concerns about delay and cost. This diversion could indicate a decrease in access to justice and in the quality of the decision-making used to resolve the disputes. On the other hand, it is possible that individuals and corporations who have made a rational decision not to litigate or continue litigation in the Ontario Court (General Division) may be satisfied with their decision. A survey of those who have commenced but abandoned litigation may be a feasible means to assess why cases are being diverted from the courts and the consequences of such diversion.

Court congestion and delay may itself have significant effects on demand for court services. For example, it has been observed that the creation of an intermediate appellate court to reduce the backlog of appealed cases may only stimulate more appeals which in turn will eventually lead to additional backlog.²⁸ This suggests a degree of self-regulation in the market for court services with improved efficiency being off-set by increased demand for court services.²⁹ The last twenty years has witnessed several waves in terms of cases commenced which could be explained on the basis of low volume times producing efficiency which attracted more claims which in turn resulted in delay which made litigation less attractive.³⁰ Although this phenomenon may neutralize the possibility for significant savings of public resources if litigation becomes faster and cheaper, it may increase access to justice and the quality of decision-making as disputes that had previously not been placed into a court system characterized by delay and congestion are placed within a court system that has less delay.

One available measure of the usage of court resources is reports on hours of courtroom times devoted to specific activities. One striking feature of this analysis is that more courtroom time is presently devoted to hearing motions and applications³¹ than to hearing jury and non-jury trials. In 1993/94, approximately 31,500 hours were devoted to civil non-jury and jury trials as opposed to 31,600 hours devoted to the hearing of motions and applications. Motions

²⁷ An experiment in Toronto found that 840 of the oldest 1,405 cases had been closed although the court was never officially informed. Ontario Civil Justice Review *First Report* at pp.157-8.

²⁸ Ministry of the Attorney General *Appellate Court Reform in Ontario A Consultation Paper* (1994) at pp.32-33.

²⁹ This is Priest's conclusion based on a study of court congestion in Cook County, Illinois. George Priest "Private Litigants and the Court's Congestion Problem" (1989) 69 Boston U.L.R. 527. Similarly, Michael Trebilcock posits that increased efficiency in the delivery of court services will mean that "a number of cases that are presently settled, because of the costs and inconvenience of delay, will now be litigated, thus increasing the supply of litigated cases. In other words, the price of litigation relative to settlement has been reduced. Second, the reduced delay will draw cases into either the settlement or litigation stream that previously were not subject to formal suit at all...increasing the capacity of the system has a short run impact on delay, but this usually evaporates either largely or completely over time." "An Economic Perspective on Access to Civil Justice" in Ontario Law Reform Commission *Study Paper on Prospects for Civil Justice* (1995) at pp.290-1. Garry Watson similarly predicts that the court system "simply 'self-corrects' by attracting new cases that cancel out any initial gains." "Comments" *ibid.* at p. 301.

³⁰ Twohig, Baar, Meyers and Predko, "Empirical Analyses of Civil Cases Commenced and Cases Tried in Toronto, 1973-1994", *supra*, at p. 83 (Table 2.1) and at 90 (Table 3.3).

³¹ Unfortunately no distinction is made between motions and applications so that it is not possible to say what percentage of the time is spent on interlocutory matters and what is spent on hearings by way of the summary application procedure. Nevertheless, the high number of motions heard each year as compared to the number of applications filed suggests that interlocutory matters probably take up a significant majority of the hours recorded under the motions/application heading.

are brought in 50% of all cases commenced even though most of these cases do not go to trial. In 1993/94, only 5.7% of cases that went to trial recorded no motions and 23.4% had five or more motions.³² The reasons for this dramatic increase in motions are speculative. Some motion activity may reflect procedural changes, while other activity may reflect changes in legal culture brought on by the pressures of hourly billing and the emergence of a large, less homogenous litigation bar that is less inclined to resolve interlocutory disputes without judicial intervention. A priority for the Civil Justice Review should be to understand the reasons for the explosion in motions activity and to devise means to prevent the need for motions, at least motions that do not result in the disposition or partial disposition of cases.³³

In addition to the 31,600 hours devoted to hearing motions and applications in 1993/94, an additional 12,500 hours were spent on pre-trial hearings in 1993/94.³⁴ The number of civil pre-trials has increased from 10,370 in 1989/90 to 17,227 in 1993/94.³⁵ Much of this increase is because of increased emphasis on case management and judicial encouragement of settlement. The court has absorbed this increased activity only because of a 140% increase in the number of hours devoted to pre-trial conferences.³⁶ Without significant expansion of the court or judicial officials such as masters, it may be difficult to expand this activity in the future without dramatic declines in civil and criminal trials and motions.

Hourly usage rates suggest that the Civil Justice Review should focus more on the pre-trial stage of litigation than actual trials if the object is to reduce the demand on court resources³⁷ or costs to litigants.³⁸ It may also be easier to streamline the pre-trial process because that

³² In contrast, in 1973/74 over 30% of cases that went to trial had no motions. "Empirical Analyses of Civil Cases Commenced and Cases Tried in Toronto, 1973-1994" *supra*, at p. 124.

³³ Data is not readily available on the number of motions for summary judgment. An increase in these motions or motions under a new summary trial rule could be a positive development. Motions to prevent irreparable harm will continue to be important to ensuring access to justice. The Supreme Court has recently liberalized the availability of interlocutory relief in the constitutional context. *R.J.R. Macdonald Inc. v. Canada* (1994) 111 D.L.R.(4th) 385 (S.C.C.) discussed in Kent Roach *Constitutional Remedies in Canada* (Toronto: Canada Law Book, 1995) ch.7.

³⁴ Twohig "Civil Justice Statistical Information in Ontario" (January 20, 1995, internal working paper, on file with Ministry), at tab 2.

³⁵ The number of criminal pre-trials has also increased, albeit not as dramatically with 6,157 being held in 1989/90 and 8,981 being held in 1993/94. Ministry of the Attorney General *Court Statistics Annual Report 1993/94* p.9 Provincial Summary. The Martin Committee has recommended increased use of pretrial conferences after disclosure as a procedure that "can contribute greatly to the early and fair resolution of many cases". *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions* (1993) at p. 348.

³⁶ Civil Justice Review *First Report* March, 1995 at p.63.

³⁷ For an account of the growing importance of motions as opposed to trials under the American federal rules of civil procedure see Yeazell "The Misunderstood Consequences of Modern Civil Process" [1994] Wis.L.Rev. 631.

³⁸ Motions and pre-trial conferences which require the preparation of records and factums "may improve the judge's performance, but increase lawyers' fees." Watson "Comment" in Ontario Law Reform Commission *Study Paper on Prospects for Civil Justice* (1995) at p.299. The paper produced in litigation as measured by the storage space required for court documents has increased dramatically. In 1973/74 for example it required 333 boxes to store 35,379 civil claims whereas in 1988/89 it required 1488 boxes to store 37,000 civil claims. "Empirical Analyses of Civil Cases Commenced and Cases Tried in Toronto, 1973-94" *supra*, at p. 102. Part of this increase can likely be

process, at least when it is not used to dispose of cases or prevent irreparable harm, does not involve the same due process considerations as trials.

Much discussion of Ontario's civil justice system has focused on backlog as measured by the number of cases pending on the trial list. These have increased steadily, with some decline in 1994. The Civil Justice Review reports 23,303 pending cases, 56% of which have been pending for more than 12 months.³⁹ The report goes on, however, to reveal evidence which suggests that this figure should be viewed with caution. An experiment conducted in Toronto involved sending letters to determine the status of 1,405 of the oldest cases listed for trial. It was discovered that 840 of these cases were in fact closed although the court had never been informed of that fact. As discussed above, we do not know how many of these cases were settled in a satisfactory manner and how many reflected frustration with the inefficiency of the system and perhaps injustice. In addition, 275 of the remaining cases had already been pre-tried or given dates for trial.⁴⁰ Similar results were also reported in Ottawa. This suggests that "backlog" figures may be quite artificial and overestimate real backlog by as much as 90%! It also suggests that one of the virtues of case management may be keeping a closer tab on cases. Lawyers who do not inform the court of cases that are abandoned or settled should be sanctioned for contributing to artificial backlog.

(c) SUMMARY

The above survey demonstrates the dynamic nature of the landscape of disputes and court usage and the significant effects that legislative interventions may have on disputes and court usage. For example, statutory limitations on litigation over automobile accidents have decreased litigation while fewer restrictions on this type of litigation may revive a significant demand on the courts. The prevalence of reported disputes about discrimination in Ontario households suggests that legislative or judicial repeal of the preclusive effects of the Supreme Court's decision in *Bhadauria* might significantly increase demand for court services.⁴¹ The landscape of disputes in Ontario society is dynamic and can to some extent be regulated to divert disputes either away from or towards the superior courts.

Court usage rates are also dynamic. The last few years have witnessed a significant decline in the number of actions commenced in the Ontario Court (General Division). A significant

attributed to the increased use of motions during this time period as well as greater reliance on technology such as photocopying and wordprocessing.

³⁹ *First Report* at p.57.

⁴⁰ *First Report* at pp.157-8.

⁴¹ The legislative repeal of *Bhadauria* might be one possible response to dissatisfaction with the present system of reliance on investigation by human rights commissions into human rights complaints. The potential for judicial incursions into the *Bhadauria* principle is demonstrated by *Weber v. Ontario Hydro* (1992) 98 D.L.R.(4th) 32, a case in which the Ontario Court of Appeal held that while an employee could only bring tort claims through a comprehensive process of labour arbitration, he could go directly to the superior courts to the extent that he claimed the governmental employer violated his Charter rights. Arbour J.A. expressed the following sentiments which are in some tension with *Bhadauria*. "The rights asserted in this case are individual constitutional rights that should not be made subservient to the procedural control of a group, such as a union; the range of remedies available should not be curtailed by the collective contractual choice of a forum which is not designed to award just and appropriate remedies for infringement of individual rights." *ibid.* at 43. The Supreme Court reversed and held that the Charter damage claim should be determined by the labour arbitrator (1995) 125 D.L.R. (4th) 583. See generally Kent Roach *Constitutional Remedies in Canada* (Aurora: Canada Law Book, 1995) at 6.500-6.545.

portion of this decline is attributable to legislative intervention in the automobile accident field, but other parts of the decline are less easy to explain. The demand for court services may in some aspects be self-regulating with demand declining when delay and congestion makes litigation less attractive. Decreased demand may allow the court to catch up and improve efficiency and this may then stimulate greater use of the courts. The self-regulating nature of the demand for court services also suggests that increased efficiency in disposing of cases may only stimulate increased demand. This does not, however, mean that the increased use of court resources will not be justified by concerns about increasing access to justice and the quality of decision-making used to resolve disputes in Ontario society. More research is needed to determine the degree of client satisfaction with claims that are litigated as compared to claims that are diverted because of concerns about the delay and expense of litigation. Data on court usage suggests that the Civil Justice Review should be more concerned with the numbers of motions filed and the judicial resources expended at the pre-trial stage than at the trial stage. Finally, data on backlog should be viewed with some caution given evidence which suggests that many cases that appear to be languishing on trial lists have actually been disposed or are close to trial.

3. FACTORS AFFECTING THE COMMENCEMENT OF CIVIL PROCEEDINGS

There are various economic, cultural, political, procedural, and substantive factors that affect the demand for court services. Some have seen the enactment of the Canadian Charter of Rights and Freedoms as a sign of increasing reliance on litigation in Canada.⁴² A relaxation in the interpretation of statutes of limitations in the 1980's may have allowed claims that would have previously been deemed stale to be litigated. In Ontario, recent legislation such as the *Environmental Bill of Rights* and the *Class Proceedings Act* allow claims to be brought that were difficult or impossible to litigate before.⁴³ Nevertheless, the fundamental barrier remains the costs of litigation both in terms of the requirement for a litigant to pay his or her own lawyer's fees and, if unsuccessful, to pay part of his or her opponent's legal costs. A successful litigant will, of course, receive an indemnity from his or her opponent but this will only cover a portion of legal costs and be received at the end of a successful trial. The following discussion will focus on the costs of litigation and in particular the implications of having legal services and indemnities based on how many hours that lawyers devote to a matter.

⁴² S.M. Lipset *Continental Divide* (New York: Routledge, 1990); W.A. Bogart *Courts and Country* (Toronto: Oxford, 1994). Nevertheless, the effect of the Charter seems to be on criminal and administrative law, not civil justice in the superior courts. In 1978/79, 1% of a civil trial sample involved a government while in 1993/94 that number had only increased to 1.2% "Empirical Analyses of Civil Cases Commenced and Cases Tried in Toronto, 1973-1994", *supra*, at p. 120. Major civil actions against the Ontario government have increased from 4 in 1985 to 26 in 1995, but this figure still remains modest given the overall number of cases. *Globe & Mail* December 18, 1995 p.A.4.

⁴³ As with the Charter, the effects of these innovations on total civil caseloads is likely to be slight. The proliferation of statutes in general does not appear to have had a dramatic effect on litigation as over 80% of claims commenced and gone to trial in Ontario between 1973 and 1994 did not plead statute law but rather relied on the common law. Twohig, Baar, Meyers and Predko, "Empirical Analyses of Civil Cases Commenced and Cases Tried in Toronto, 1973-1994", *supra*, at p. 114.

(a) HOURLY BILLING BETWEEN LAWYERS AND THEIR CLIENTS

The cost of hiring a lawyer is commonly perceived as the single biggest obstacle to litigation in the Ontario Court (General Division). At present, the legal services necessary to a litigate a case in the superior courts can generally only be purchased with an initial retainer to the lawyer and a commitment to pay an hourly rate for legal services, as well as for expert's reports and disbursements. This entails considerable risk and costs for the client. One notorious case highlights the unpredictability of legal bills based on hourly rates and the discredit that unreasonable fees can bring to the legal profession.⁴⁴ A client went to a large Toronto law firm to resolve a property and child support dispute with her ex-husband and apparently entered into a retainer on the basis that it would cost between \$8000 and \$24,000 to resolve the matter. Query how many readers would enter into a home renovation contract with such a wide range?⁴⁵ Two years later, the client received a legal bill totalling \$63,015. The lead lawyer in the case billed 188.6 hours⁴⁶ at \$245 an hour while eight other lawyers worked on the case at similar rates. In addition, the services of eight law students, five law clerks and five legal secretaries were also billed to the client. An assessment was taken which reduced the legal bill by \$27,000 from \$63,000 to \$36,000. This assessment was upheld on judicial review before a judge of the Ontario Court (General Division). This story may not be typical⁴⁷, but it does dramatically illustrate the unpredictable effects of hourly billing. Hourly billing makes it difficult for a client to make economically rational decisions to litigate. By the time the client realizes the costs incurred, he or she may already have made an investment which makes even reasonable settlement offers look unattractive. At this point, the hope of achieving a partial indemnity from one's opponent if successful may also encourage people to persist with litigation.

Client dissatisfaction with legal bills seems to be on the increase. In 1993/94, 5,514 appointments for official assessment or taxation of legal bills between solicitors and their clients were made as compared to 2,143 appointments in 1989/90.⁴⁸ These figures dramatically underestimate the number of assessments because they exclude data from Metro Toronto. Assessment of solicitor/client bills impose additional costs on clients and the public and the

⁴⁴ Tracey Tyler "Woman Wins Fight to Have Legal Bill Cut by \$27,000. Toronto Star March 23, 1993 p.A5. The case is summarized in *Osler, Hoskin and Harcourts v. Watson* (1993) 38 A.C.W.S.3d 882 (Ont.Ct.Gen.Div.)

⁴⁵ The lawyer testified that he informed the client that if litigation was undertaken the cost would be between \$30,000 and \$90,000 but the assessment officer found this estimate to be so open-ended as to be useless.

⁴⁶ "Because the firm, like most big law, charges for every six minutes of time spent on a case, even a brief chat with another lawyer about Watson's file would be calculated into the cost..." Tracy Tyler "Woman Wins Fight to Have Legal Bill Cut by \$27,000" *supra*.

⁴⁷ It may also not be atypical. The Civil Justice Review produced a typical bill for litigation in the Ontario Court (General Division) that closely resembled its survey of lawyer's fees. *First Report* March, 1995 at pp.144-146 The bill which was calculated entirely on the basis of hourly rates totalled 191 hours billed to the client at a rate of \$200 an hour for a total of \$38,200.00.

⁴⁸ *Court Statistics Annual Report 1993/94 Provincial Summary* at p.9. Assessment is a rather formal procedure often requiring another lawyer to be hired, so that it can be assumed that the total number of solicitor client assessments, although growing, does not reflect the extent of client dissatisfaction with their legal bills. On the formal procedures of assessments as heard by masters. see R.B. Peterson "The Assessment of Costs Pursuant to the Solicitors Act" (1988) 9 Adv.Q.448.

also are a large source of dissatisfaction with the legal profession.⁴⁹ At a minimum, steps should be taken to make it easier for a client to have his or her legal bill assessed. Research should also be conducted to determine if clients appreciate hourly billing or would be happier with a fee for service arrangement.

An economist might predict that if demand was relatively constant, the 250% growth of the legal profession in Canada since the 1960's⁵⁰ would drive the cost of legal services down by increasing the supply of lawyers. This may be true in some aspects of the market of legal services, but litigation services in the superior courts remains a specialized "high-end" legal service. One consequence of the growth of the legal profession has been the expansion of law firms and the introduction of hourly billing since the mid-1960's.⁵¹ Hourly billing is now deeply embedded in the political economy of the legal profession because it is used not only as a means to bill the client but to determine productivity targets for students, associates and partners and to provide a quantitative basis to determine the promotion of associates to partners and the remuneration received by partners.⁵²

Hourly billing has been widely recognized as a contributing factor to the delay and cost of litigation. In 1987, the Zuber Inquiry recommended that the *Solicitor's Act* and various rules of courts be amended to provide that the value of the work done, not the hours spent, be the paramount consideration when assessing a lawyer's bill or costs between the parties.⁵³ Zuber concluded:

⁴⁹ The Hughes Committee in British Columbia for example reported: "Most of the dissatisfied litigants that the Committee heard from had a common complaint: their lawyers never told them how much it would all cost. They didn't necessarily feel that their lawyers had overcharged, but they felt they had not been prepared for the amount of the bill. Lawyers generally find it difficult to estimate for clients what a matter will cost. Particularly in a lawsuit, where so much depends on the positions taken by the other side, it can be almost impossible to predict the ultimate cost." *Access to Justice The Report of the Justice Reform Committee* (1988) at 158.

⁵⁰ David Stager and Harry Arthurs *Lawyers in Canada* (Toronto: University of Toronto Press, 1990) at p.149. In July, 1979 there were 9,997 active lawyers with law firms or as sole practitioners in Ontario whereas in July, 1994, there were 17,688 such lawyers. Accounting for population changes, there was 1 potential litigator for every 850 Ontarians in 1979 as compared to 1 for 620 in 1994. "Empirical Analyses of Civil Cases Commenced and Cases Tried in Toronto, 1973-1994", *supra*, at p. 98.

⁵¹ In 1911 for example, Middleton J. stated "nothing more injurious to the client could be suggested than that the solicitor's remuneration must depend upon the length of time taken and the number of interviews had. One may grasp a situation with great rapidity and his skill and experience may lead to its satisfactory solution in a way that after the event appears easy. Another, lacking the necessary skill and experience, may plod away at great length and in the end fail to reach as satisfactory a result..." *Re Solicitors* (1911) 2 O.W.N. 596 at 597. In the United States, it has been reported that accurate time records were rare before the end of World War II and that it was not until the middle 1960's that hourly billing became common.

⁵² Marc Galanter and Thomas Paley *Tournament of Lawyers: The Transformation of the Big Law Firm* (Chicago: University of Chicago Press, 1991) at pp.34-35; Anthony Kronman *The Lost Lawyer* (Cambridge: Harvard University Press, 1993) ch.5. For a Canadian account of the importance of hourly billing see John Hagan and Fiona Kay *Gender in Practice A Study of Lawyer's Lives* (New York: Oxford University Press, 1995) at pp.127-8

⁵³ Hon. T.G. Zuber *The Report of the Ontario Courts Inquiry* (1987) at pp.217-8

Compounding the expense picture is a system of awarding costs at the end of the a case which rewards inefficiency and prolixity by basing the assessment of costs on the number of motions, days at trial and hours spent on preparation. Legal aid fees are calculated in much the same manner.⁵⁴

The *Solicitors Act* was not amended and the criteria for assessment remain largely a matter of common law. The following factors are usually considered:

1. The time expended by the solicitor.
2. The legal complexity of the matters dealt with.
3. The degree of responsibility assumed by the solicitor
4. The monetary value of the matters in issue.
5. The importance of the matter to the client
6. The degree of skill and competence demonstrated by the solicitor
7. The results achieved
8. The ability of the client to pay.
9. The client's expectations concerning a fee.⁵⁵

This list can reward lawyers for engaging in complex, skilful and time-consuming legal manoeuvres. On the other hand, the monetary value of the case and the client's expectations and ability to pay could potentially limit the legal bill despite the hours spent on the case. This list does not include factors such as conduct that tends to lengthen unnecessarily the proceedings or conduct taken through negligence, mistake or excessive caution or a refusal to admit anything that ought to be admitted. These latter factors can be considered when assessing party and party costs in an attempt to influence litigant behaviour.⁵⁶ Consideration should be given to not allowing lawyers to collect fees for such procedures.

Where the *Solicitor's Act* does provide some criteria for assessing lawyer client bills, it favours adversarial autonomy over efficient and expeditious litigation by allowing fees for unnecessary steps in litigation to be collected provided "the steps were taken by the solicitor because, in his or her judgment, reasonably exercised, they were conducive to the interests of his or her client" or even were taken "by the desire of the client after being informed by the solicitor that they were unnecessary and not calculated to advance the client's interest."⁵⁷ The latter clause favours adversarial autonomy over the professional judgment of even the client's own lawyer that a procedure will not advance the client's interests. Moreover, it allows a

⁵⁴ *Ibid.* at p.52. This was stated in reference to costs between the parties which will be discussed in the next section but the same criticism could be made concerning the hourly billing practices of lawyers. The Civil Justice Review reported that "the public believes that lawyers have an incentive to waste time and effort. The 'billable hour', which is the most common basis upon which legal fees are calculated these days, is seen to encourage lengthy proceedings and inefficient handling of cases. Even a poor job extracts a payment for hours of work at a seemingly exorbitant hourly rate." Civil Justice Review *First Report* March, 1995 at p.126. See also Adrian Zuckerman "A Reform of Civil Procedure: Rationing Procedure rather than Access to Justice" (1995) 22 J. of Law and Society 155 at 157; Lord Woolf *Access to Justice Interim Report* June 1995 c.25.

⁵⁵ *Re Solicitor* [1972] 3 O.R. 433 at 436-7 (T.O. S.C.O.); *Re Cohen* (1985) 26 C.P.C.(2d) 211 (Ont.C.A.). Mark Orkin has stated: "Although time expended and hourly rates form the basis of many accounts, the mechanical application of an hourly rate to a given number of hours by the assessment officer may be an error in principle." *The Law of Costs* 2nd ed (Aurora: Canada Law Book, 1994) at p. 311.

⁵⁶ R.58.06(1)(e)(f)(g).

⁵⁷ *Solicitor's Act* *supra* s.7.

lawyer to be paid for what are essentially frivolous procedures. The client is not the only person who pays for excessive adversarial zeal because his or her opponent must pay the cost of responding to the unnecessary procedures and the public must pay the cost of having such procedures processed by officials and heard by judges. The medical analogy would be allowing patients to demand procedures and tests even after being informed by their own doctors that they were unnecessary.

The Hughes Committee on Access to Justice in British Columbia also noted some problems produced by hourly billing and concluded:

If the amount of time spent on a case is multiplied automatically by the hourly rate, without regard to any other factors, the result will often be unfair. A client will pay more for the same work done by an inefficient lawyer than by an efficient one. Responsible lawyers who charge on the basis of an hourly rate do adjust their hours to take into account time that was spent unproductively and also their client's means and other relevant factors.⁵⁸

Although reduction from the number of hours recorded and billed is common, it is in many respects perceived as a discount. Even if the total numbers of hours spent on a file are not billed, they may still serve as an important indicator of a lawyer's productivity to his or her colleagues. If these unbilled hours result in more motions and documents, some of the costs are passed on to adversaries who must respond and courts who must process and hear such procedures. Hourly billing presents a real risk of "overlawyering" because it gives lawyers incentives to prolong cases by taking more interlocutory motions and extending discovery.⁵⁹ For all these reasons, serious consideration should be given to how to break the hourly mould in the provision of legal services.

(i) Increased Regulation of Lawyer/Client Bills

As recommended by Zuber and others, one option is to amend the *Solicitors Act* to make clear that the time expended by the lawyer will not be the overriding factor in assessing costs between lawyers and their clients. Amending the criteria for assessment in the *Solicitors Act* itself would probably not be enough to change billing practices. Assessment procedures could be made more accessible and transferred to the Law Society or another regulatory body.⁶⁰ Such a body could develop guidelines and tariffs as to the amount of time⁶¹ that should be devoted to each step in litigation. It could also conduct random audits of legal bills to ensure that clients have not been charged unreasonable amounts. In Germany, legal fees are set by

⁵⁸ *Access to Justice The Report of the Justice Reform Committee supra* at p.156.

⁵⁹ Hourly billing is not the only potential factor that might create an incentive to "overlawyer". Fear of liability for professional negligence may be another. The complexity of the law and less collegiality among the bar may be other factors. In general, more research needs to be done on the way that lawyers practice and their motivations.

⁶⁰ The Civil Justice Committee in Victoria proposed increased regulation of legal fees in part because "some parts of lawyers' work are covered by a form of monopoly and, like all other monopolies, it is important to know whether pricing in such areas is consistent with the public interest and how it is monitored." Civil Justice Committee of Victoria *Report to the Attorney General Concerning the Administration of Civil Justice in Victoria* (1984) vol 1. at p.250.

⁶¹ Although tariffs are by nature somewhat arbitrary they already play a role in the assessment of party and party costs in Ontario and many other jurisdictions. Tariffs expressed by hours would be less of a restriction on freedom of contract than those which cap the amount billed for each procedure.

law and based on the value of the case and the stage of litigation.⁶² This latter feature can cause strategic behaviour in lawyers and for that reason the fee for the collection of evidence before a judge can now be awarded even when the case settles before that stage of litigation.⁶³ The German approach may not be readily applicable in Ontario because lawyers in Germany play less of a role in developing and presenting evidence to the court.⁶⁴

Proposals for greater regulation of bills between lawyers and their clients may be criticized as an unwarranted interference with freedom of contract. This might be true if such supervision was proposed for some private industry but the legal profession has been granted a monopoly to offer legal services in the Ontario Court (General Division) and with that monopoly comes the public responsibility to ensure that fees are not only reasonable but also consistent with public goals such as ensuring access to justice and preventing unnecessary procedures which impose costs on opponents and the public. The problems with increased regulation are more practical than theoretical. Increased regulation will likely result in adaptive behaviour by lawyers. Some studies suggest that lawyers' bills to legal aid plans tend to cluster around maximum hours that are set by the tariff.⁶⁵ Similarly if capped legal bills were mandated for the lower end of litigation as suggested in the interim report of Lord Woolf's committee in the United Kingdom⁶⁶, lawyers may attempt to encourage client's to claim more than that amount in order to avoid the regulation of legal costs. At the least, clients would have to be educated about the benefits of claiming a more modest amount, but having their legal costs capped.

(ii) Less Regulation of Lawyer/Client Bills

Increased regulation is not the only possible means to diminish reliance on hourly billing. As will be suggested with relation to case management, reformers should be cautious that

⁶² The German approach ensures that legal fees do not exceed the value of the case. Legal costs consume 25% of the value of cases worth 10,000DM, but only 3% of cases with a value of 1,000,000 DM. A significant portion of these costs are paid in court fees not only lawyer's fees. See Lord Woolf *Access to Justice: Interim Report* June 1995 annex 5.

⁶³ Adrian Zuckerman "A Reform of Civil Procedure- Rationing Procedure rather than Access to Justice" (1995) 22 *J. of Law and Society* 155 at 175-6.

⁶⁴ John Langbein "The German Advantage in Civil Procedure" (1985) 52 *Univ. of Chicago L.Rev.* 823; Garry Watson "'Now for Something Completely Different' or the 'Brave New World': From an Adversarial to a Managed System of Litigation- A Comparative Critique of the Woolf Report" prepared for Legal Action Group's Conference on Achieving Civil Justice, London, Nov.10-11, 1995 at pp.18-19.

⁶⁵ A comparison of hours spent on legal cases in Manitoba found that private lawyers billed significantly more hours for cases than staff lawyers and that this effect was most pronounced in the more simple cases. The evaluator concluded that these differences could be explained by differences in the way private lawyers and staff lawyers conducted the cases and "the private Bar's treatment of the Tariff as a minimum pay schedule. The propensity of the Bar to devote more time to the non-legal aspect of running a law office and treating that Tariff as a minimum appear to be stronger contributors to the time difference than other possible explanations." quoted in Canadian Bar Association National Legal Aid Liaison Committee *Legal Aid Delivery Models: A Discussion Paper* November, 1987 at p.45.

⁶⁶ Capping would apply to both the client's bill from his or her own lawyer and any indemnity paid to the other party. It would be expressed as a percentage of the claim and apply to fast track cases with a value less than £10,000. Lord Woolf *Access to Justice Interim Report* July, 1995 c.7 para 17.

increased intervention in the civil litigation process does not result in more rather than less expense. Another strategy would be to allow greater freedom in fee setting by legalizing contingency fees which remain illegal in Ontario except in relation to class actions.⁶⁷ Contingency fees provide that lawyers should only be paid should their client win and in their classical form express the lawyers' remuneration as a percentage of the judgment. Under such an arrangement, it would not matter how many hours the lawyer devoted to a case. In direct contrast to hourly billing, the lawyer would have an incentive to spend the least time necessary to obtain a successful outcome. This would not provide savings to his or her client who would only receive a bill based on a percentage of the judgment not the hours spent on a case, but could produce savings to the other side and the public should the lawyer not bring motions or prolong discovery. It is unlikely that contingency fees will result in more frivolous litigation especially under Anglo-Canadian costs rules which would make the party or even the lawyer responsible for a significant portion of its opponent's costs if unsuccessful.⁶⁸

In Ontario, contingency fees are only legally enforceable when used by a representative party in a class action and the fee must be based on an hourly rate subject to a multiplier to be determined by the judge to result "in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success."⁶⁹ There has been little experience with these contingency fees but given that they remain based on a hourly rate, they are unlikely to break the hourly mould for the provision of legal services. In fact, the contingency fee arrangements contemplated in the *Class Proceedings Act* provide a greater incentive for hourly billing than the de-facto contingency arrangements that some commentators maintain are used in Ontario in personal injury cases and are conceived as a percentage of the settlement or judgment.⁷⁰ Contingency fees are not likely to break the hourly mould in the provision of legal services unless they are expressed in terms of a percentage of the judgment.

A committee of the Law Society of Upper Canada has recently recommended that contingency fees be capped at 20% of the judgment⁷¹ and that the successful lawyer receive party and party costs from the losing party.⁷² These latter costs would presumably be calculated with reliance on hourly billing so that even though part of the lawyer's compensation would be determined in relation to the judgment, a significant portion would still

⁶⁷ Contingency fees are legal but regulated in most other Canadian jurisdictions. In the United States they are typically not regulated. A bill has recently been introduced in the United Kingdom to legalize contingency fees, apparently subject to minimal regulation. The Law Society has proposed a model agreement that will cap the premium received by a lawyer in the event of success by 25% of the client's damages. "Lawyers to get 'no win no fee' deals for cases" *The Guardian* April 21, 1995 at p.5.

⁶⁸ P. Halpern and S. Turnbull "Legal Fees Contracts and Alternative Cost Rules: An Economic Analysis" (1983) 3 *Int.Rev. of Law and Economics* 3.

⁶⁹ *Class Proceeding Act* S.O. 1992 c.6 s.32(7)(b).

⁷⁰ Herbert Kritzer "Fee Arrangements and Fee Shifting: Lessons from the Experience in Ontario" (1984) 47 *Law and Contemporary Problems* 125 at 131-2.

⁷¹ For arguments concerning the difficulties of capping contingency fees especially given the different stages that litigation may be terminated see Michael Trebilcock "The Case for Contingent Fees: The Ontario Legal Profession Rethinks Its Position" (1989) 15 *Can.Bus.L.J.* 360 at 365-7.

⁷² Report of the Special Committee on Contingency Fees, Feb. 28, 1992.

be calculated on the basis of the number of hours spent on a case. The Committee was concerned about "cases in which enormous amounts of work are required to be done by the solicitor which are subsequently reflected in very large amounts for party and party costs" and noted that "this is particularly important in Ontario where the level of party and party costs is significantly higher than almost every other jurisdiction in Canada".⁷³ This proposal, like the hourly-based contingency fees allowed under the *Class Proceedings Act*, is unlikely to break the hourly mould in the costing of legal services.

Would contingency fees decrease the costs of litigation for the public? The Civil Litigation Research Project examined 1650 cases in the United States to test the proposition that lawyers would spend less time on cases conducted on a contingent fee basis than those in which they were paid an hourly fee. This hypothesis was that lawyers working on an hourly fee would overinvest in the time they spent on a file while those who were compensated by contingency fees would underinvest and spend less hours on a file.⁷⁴ The project could not, however, confirm this hypothesis and its data on "middle level" litigation suggested that, if anything, lawyers spent more time on contingency fee files, albeit not in a statistically significant manner.⁷⁵ This finding suggests that the hours devoted to a file may partly depend on non-economic factors such as a lawyer's own sense of professional satisfaction, professional ethics and the conduct of one's adversary. Clearly more research is required to determine the relative effects of hourly billing and contingency fees on lawyer behaviour especially with regard to the numbers of motions and disposition times for cases financed under each fee arrangement.

(iii) Budgeted Litigation

An alternative to either increased official regulation of legal fees or deregulation through contingency fees is to allow the parties to negotiate among themselves enforceable limits on their litigation budgets. Turriff has proposed that parties be required to meet after the close of pleadings and attempt to reach agreement on the total amounts to be spent on lawyer fees and other disbursements.⁷⁶ In the absence of agreement, the budgets could be set by an officer of the Court. Such a proposal could be criticized as an unacceptable limitation on the freedom of each litigant, but it attempts to achieve the consent of the parties and does not control how the money is allocated within the budget. As Turriff has argued:

Limiting what could be spent on litigation, as I propose, to amounts that have been agreed by parties, or to reasonable amounts that have been fixed where parties have not acted responsibly to agree, is no more arbitrary and no more an interference with liberty than is fixing in advance the maximum

⁷³ *Ibid.* Appendix A "The Costs-Plus Principle"

⁷⁴ Earl Johnson Jr. "Lawyers' Choice: A Theoretical Appraisal of Litigation Investment Decisions" (1980) 15 *Law and Society Rev.* 567.

⁷⁵ David Trubek et al *Civil Litigation Research Project Final Report* (1983) at p.S-51. A subsequent analysis of the same data, however, found that in cases where the stakes were under \$10,000, contingency fee lawyers spent statistically significant fewer hours on files. Herbert Kritzer et al "The Impact of Fee Arrangement on Lawyer Effort" (1985) 19 *Law & Society Rev.* 251 at 269.

⁷⁶ Under the *Civil Justice Reform Act of 1990*, Title I of Pub.L. 101-650 some American Federal Courts have required counsel through a joint case management plan to submit estimated costs for discovery and litigation. Judicial Conference of the United States *Civil Justice Reform Act Report* December, 1994 at pp.15-16. Evaluations of these and other reforms in the United States have not yet been completed.

amount that can be made payable for damages for non-pecuniary loss in personal injury cases...[or] fixing what amount candidates may spend to win elective office.⁷⁷

The weakness of this proposal is more practical than theoretical. It could require extensive resources for parties to agree on litigation budgets. If an agreement is not reached, assessment officers will have to establish, revise and enforce budgets for each litigant. If there is to be increased official intervention, it would probably be less costly to rely on ex post assessments of controversial legal bills rather than ex ante certification of all litigation budgets.

Nevertheless, voluntary negotiation of litigation budgets could be helpful in allowing parties to better judge the costs of litigation. Discussion of a litigation budget could be made part of settlement conferences between the parties. In the majority of cases where the expected recovery does not dwarf legal fees, such considerations should increase settlement ranges and make it rational to settle sooner rather than later.⁷⁸ Litigation budgets could also be prepared as part of a standard retainer between a lawyer and his or her client. This would decrease the danger of lawyers running up bills that come as a surprise to their clients.

Because of disparities between the information possessed by lawyers and their clients, it is difficult to expect clients themselves to ensure that their lawyers do not engage in unnecessary and costly procedures. The negotiation of a litigation budget between lawyers and their clients could, however, give clients a better sense of the costs they should be incurred and place them in a better bargaining position when negotiating with their lawyer increases from the budget. Steps can also be taken to give clients more information by providing them with information about average or suggested fees for set procedures and the basic procedural framework of a lawsuit. Large corporations and legal aid societies are experimenting with franchising schemes that force law firms to engage in competitive bidding for legal contracts. Under such bidding schemes, individual consumers of legal services would be vulnerable to decreased quality of services.

(iv) Conclusions

This section has identified hourly billing as the dominant factor in determining legal fees and has suggested that this gives lawyers incentives to "overlawyer", imposing unnecessary costs on their clients, their opponents and the public. Various strategies to limit reliance on hourly billing have been outlined, including increased regulation of legal fees, the legalization of contingency fees, budgeted litigation and giving consumers of legal services more information. All of these options can be justified given the monopoly that lawyers enjoy in offering the services necessary to litigate in the superior courts. However, there is not enough information at present to state which of these strategies will work best. The most that can be said is that contingency fees based on a multiplier of hours spent on a case, as opposed to a straight percentage of the judgment, will not likely decrease the incentives for lawyers to maximize the billable hours on a case.

⁷⁷ "A Proposal for Mandatory Budgeted Litigation" (1995) 53 *The Advocate* 35 at 38.

⁷⁸ The Civil Justice Review's survey indicated that the average claim in the Ontario Court General Division is about \$197,000 while the median claim is about \$32,000. This suggests that in many cases, even the anticipated claim will not exceed the costs that a client must pay to his or her own lawyer. The average judgment is \$58,000 with the median judgment only \$15,000. *First Report* March, 1995 at p.146.

Fortunately, this is an area amenable to controlled experiments. The Ontario Legal Aid Plan which spends a significant share of its budget on civil litigation could experiment with various forms of funding litigation. This includes the use of salaried staff or clinic lawyers, hourly billing with or without hard caps, set funding for specific legal procedures, contingency fees (if legalized) and competitive bidding among law firms or groups of lawyers for blocks of cases. The existence of a public legal aid plan allows for controlled and evaluated experimentation with different forms of funding. Studies should be conducted to compare costs both to the plan, other parties and the courts in similar legal aid cases that are funded in different ways. Client satisfaction should also be monitored.

Other reforms should be attempted. The *Solicitors Act* should be amended to make it easier for clients to have their legal fees assessed. It should also be made clear that the hours devoted to a matter is not the dominant factor in determining legal bills and that lawyers should not be paid for unnecessary procedures. Attempts to devise and even enforce litigation budgets could be added to case management strategies to determine whether such budgets increase settlement rates and help control client costs. Lawyers could be encouraged or required to devise more precise litigation budgets as part of their retainer with clients. This would better enable clients to predict the costs of litigation and make more rational decisions whether to settle or litigate. More drastic attempts to regulate legal fees through mandated capping of legal fees could also be attempted but care must be taken if increased regulation is not to be neutralized by adaptive behaviour by lawyers.

(b) COSTS BETWEEN THE PARTIES TO LITIGATION

In addition to having to pay a lawyer, clients will be informed that under Anglo-Canadian practice of "costs following the event", they will have to pay about a half of their opponent's costs in the form of party and party costs should they lose.⁷⁹ The relative merits and effects of the Anglo-Canadian system of costs following the events as opposed to the American system of requiring each party to bear its own costs have been much debated and remain a matter of contention.⁸⁰ The present system reduces the costs of litigation for the victorious party while it increases costs for the unsuccessful litigant. This may discourage litigation that is perceived as unlikely to be successful, but at the same time encourage a party who is relatively certain of its claim to invest in litigation in the hope of recovering not only a favourable judgment but its party and party costs.⁸¹ Thus the rule of costs following the event may deter risky litigation but

⁷⁹ A recent random sampling of party and party costs in 98 court files found an average party and party costs award of \$8,500 and a median cost award of \$4,300. Civil Justice Review *First Report* March, 1995 at p.146.

⁸⁰ Steven Shavell "Suit, Settlement and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs" (1982) 11 J.Legal Studies 55; J.R.S. Prichard "A Systemic Approach to Comparative Law: The Effect of Cost, Fee and Financing Rules on the Development of the Substantive Law" (1988) 17 J.Legal Studies 460. For a provocative argument which suggests that the parties can simply bargain around whatever costs rules are applied see John Donohue "Opting for the British Rule or if Posner and Shavell Can't Remember the Coase Theorem, Who Will" (1991) 104 Harv.L.Rev. 1093.

⁸¹ As Shavell notes "the British system tends to reduce the sum of expected legal costs and thus tends to make a trial more likely." For empirical studies which suggest that adoption of the British rule for medical malpractice cases in Florida increased plaintiffs' success rates, frequency of litigation, investment in litigation and the value of plaintiffs' settlements and judgments. See Snyder and Hughes "The English Rule for Allocating Costs" (1990) 6

reward and encourage more certain litigation. This may save some public resources on hearing innovative claims, but perhaps waste them when a party litigates a case it believes it is certain of winning in part because a significant portion of its litigation costs will be paid by its opponent as the losing party.⁸²

The present system of costs following the event may threaten access to justice by imposing a large down side risk on those who bring novel claims or claims with limited monetary value on behalf of diffuse groups. For these reasons, the Ontario Law Reform Commission proposed that class actions would only be successful in Ontario if an American no way cost rule was adopted⁸³ and later recommended that no costs be awarded against litigants and intervenors who have no personal, proprietary or pecuniary interest in the proceedings unless they have engaged in frivolous, vexatious and abusive conduct.⁸⁴ Section 31 of the *Class Proceedings Act* does not adopt either of these proposals, but rather states that the court when exercising its discretion to award costs at the end of the trial "may consider whether the class proceeding was a test case, raised a novel point of law or involved matters of public interest."⁸⁵ Similarly, s.100 of the *Environmental Bill of Rights*⁸⁶ provides "the court may consider any special circumstances, including whether the action is a test case or raises a novel point of law" when deciding to award costs in an environmental cause of action. It is not known whether these

J.L.Econ. and Org. 345; Hughes and Snyder "Litigation and Settlement under the English and American Rules: Theory and Evidence" (1995) 38 J. of Law and Econ. 225.

⁸² This assumes that the other party does not share the same view of the case. The perhaps perverse effects of Anglo-Canadian rules in encouraging litigation are partially mitigated by the offer to settle rule under R.49 of Ontario's rule of civil procedure. As will be discussed below, under this rule a plaintiff who was relatively certain of winning its case could be faced with the prospect of not recovering its party and party costs from the losing party and in fact having to pay the defendant's party and party costs if it did not receive an award greater than the defendant's offer. Rule 49 does not, however, appear to deter a defendant relatively certain of its case from refusing settlements and going to trial in contemplation of collecting party and party costs when ultimately successful. Such a defendant would only be deterred from going to trial by the prospect of losing (and having to pay the plaintiff's costs including its solicitor and client costs if the plaintiff had made an offer as or more favourable than the ultimate judgment) or by the fact that even if successful, party and party costs do not provide a full indemnity for all the costs of litigation.

⁸³ Ontario Law Reform Commission *Report on Class Actions* (Toronto: Queens Printer, 1982) ch.17

⁸⁴ Ontario Law Reform Commission *Report on the Law of Standing* (Toronto: Queens Printer, 1989) ch. 6.

⁸⁵ In *Naken v. General Motors Ltd.* (1983) 144 D.L.R.(3d) 385 (S.C.C.) the discretion not to order costs against an unsuccessful plaintiff was exercised even without this legislation. On the other hand, in *Smith v. Canadian Tire* (1995) 22 O.R.(3d) 433 at 449 (Gen.Div.) costs were awarded against a non party in a class proceeding who was found to be the real plaintiff. The judge warned that "the *Class Proceedings Act*, 1992 was never intended to insulate representative plaintiffs, or class members, from the possible cost consequences of unsuccessful litigation." In *Garland v. Consumers' Gas* (1995) 22 O.R.(3d) 767 at 779 (Gen. Div.), a judge observed that the presence of some or all the factors listed in s.31(1) of the legislation will not automatically justify denying costs to a successful defendant and the court's must balance "the plaintiff's right to access to the justice system where the case is a novel one, a test case or one that raises an issue of public interest, with the defendant's customary right to its costs as the successful party to the litigation." In that case, however, costs were not ordered against the unsuccessful representative plaintiff.

⁸⁶ S.O. 1993 c.28.

modest departures from the traditional rule of costs following the event will be enough to stimulate litigation in these areas.⁸⁷

Since 1990, courts in British Columbia have been instructed to consider the importance and difficulty of cases when assessing costs. Higher scales of costs are available in cases which raise difficult issues, issues of general importance, and proceedings which effectively determine rights and obligations as between the parties beyond the relief that was actually granted.⁸⁸ Importance has been interpreted not as importance to the individual litigant but "to the public at large or at least to other litigation of a similar nature."⁸⁹ This can be seen as an attempt to encourage public law litigation that resolves more than a particularistic dispute between two parties. Some have warned, however, that increased costs can harm access to justice when a public interest litigant loses.⁹⁰ Public interest litigants can and should often be protected from costs awards by the exercise of the court's discretion. At the same time, however, a fuller indemnity for a litigant who successfully litigates legal issues of public importance may encourage litigation that can benefit more than the immediate parties and perhaps preempt the need for further litigation on the issue of public importance.

(i) Disciplinary Departures from Costs Following the Event

The Ontario Rules of Civil Procedure encourage departures from the normal practice of costs following the event in order to deter unnecessary procedures in litigation. Rules 57.01 and 58.06 enable courts and assessment officers to consider, in addition to the result of the proceeding, the following matters:

1. the complexity of the proceeding
2. the importance of the issues
3. the duration of the hearing
4. the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding
5. whether any step was improper, vexatious, unnecessary or taken through negligence, mistake or excessive caution
6. a party's denial of or refusal to admit anything that should have been admitted
7. whether proceedings were separated from existing proceedings unnecessarily

⁸⁷ The award of costs in Charter and other public interest litigation remains haphazard and the government is still allowed to seek costs from a losing litigant even if such an award will discourage future litigation to develop such public laws. Larry Fox "Costs in Public Interest Litigation" (1989) 10 Adv.Q. 385 at 403; Kent Roach *Constitutional Remedies in Canada* (Toronto: Canada Law Book, 1995) at 11.930-11.1020. For an empirical account which suggests that in 75% of Charter cases, the Supreme Court of Canada is following a de facto one way pro plaintiff cost rule of granting costs to successful Charter applicants but not awarding them against unsuccessful Charter applicants see Lara Friedlander "Towards a Cost Award Policy in Civil Charter Litigation" (1994) 5 Windsor Rev. of Legal & Social Issues 41 at 52.

⁸⁸ British Columbia *Rules of Court* appendix B. s.2.

⁸⁹ *Bradshaw Construction Ltd. v. Bank of Nova Scotia* (1991) 54 B.C.L.R.(2d) 309 at 317 (S.C.).

⁹⁰ Lara Friedlander "Costs and the Public Interest Litigant" (1995) 40 McGill L.J. 55 at 81-82.

In addition, the rules specifically allow courts to award costs against a successful plaintiff⁹¹, to depart from the tariffs⁹² and to disallow or award costs against a lawyer who “has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default”⁹³. In short, ample authority exists to depart from costs following the event because a winning litigant has unnecessarily contributed to delay or costs in the litigation.

Nevertheless there are some indications that the legal culture in Ontario has not caught up to these rules which encourage judges and assessment officers to penalize litigants and their lawyers for actions that unnecessarily prolong litigation. The Zuber Inquiry reported in 1987:

There are improvements that can be made in the award of costs. Firstly, the award should be made more discriminate. Currently, awards of costs are simply made to the winner almost as a matter of course. There is very little ‘fine tuning’ of the award of costs. A successful party who has been guilty of unduly prolonging the proceeding should not be rewarded for it. Even a successful party should be awarded only costs calculated on the basis of the amount of time that the matter ought to have taken....In extreme cases, the order awarding costs on the basis of how long the proceedings ought to have taken might oblige the successful party to compensate the unsuccessful party for the time wasted. Entirely apart from such qualifications in the order awarding costs, the paramount principle in the assessment of costs should be the value of the work done and not the amount time spent or the number of steps taken.⁹⁴

Zuber made clear that the problem was not so much in the wording of the relevant rules but the expectations and practices among the bar, judges and assessment officers.

Some recent cases suggest that courts remain reluctant to penalize unnecessary litigation through disciplinary costs rulings.⁹⁵ In *Young v. Young*⁹⁶, McLachlin J. recognized the disciplinary power to award costs against a lawyer, but warned that “courts must be extremely cautious” in doing so, “given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling.” She suggested that such awards should only be made with respect to excessive motions and applications or repetitive and irrelevant material when “the lawyer acted in bad faith in encouraging this abuse and delay”. The relevant Ontario rule does not on its face require bad faith and contemplates awards against lawyers who pursue steps in the litigation in the absence of reasonable cause or who cause time to be wasted by undue delay, negligence or other default. Nevertheless, Ontario courts have, with some exceptions, been reluctant to order costs against lawyers who have acted negligently but without some higher degree of fault.⁹⁷

⁹¹ R. 57.01(2)

⁹² R. 57.03(3)

⁹³ R.57.07(1)

⁹⁴ Zuber *The Report of the Ontario Courts Inquiry* (1987) at pp.217-8.

⁹⁵ Reported cases must be relied upon because there is no readily available aggregate data about the award of costs.

⁹⁶ [1993] 4 S.C.R. 3 at 135-6

⁹⁷ 931473 *Ontario Ltd. v. Coldwell Banker Inc.* (1992) 5 C.P.C.(3d) 271 (Ont.Gen.Div.); *Cini v. Micallef* (1987) 60 O.R.(2d) 584 (H.C.); *Lukic v. Urquhart* (1985) 50 O.R.(2d) 47 (C.A.). But for examples of costs being awarded

Courts have displayed not only reluctance to award costs against lawyers personally, but also to depart from normal practices of costs following the event. In a recent case, the Ontario Court of Appeal reversed a trial judge's decision not to award costs to the successful party in complex and lengthy commercial proceedings because the successful party only made a settlement offer half-way through the 316 day trial. Carthy J.A. affirmed the traditional principle that in the absence of special circumstances, costs should follow the event and warned:

The courts should be careful not to become too paternalistic with litigants or to unnecessarily discourage recourse to the trial as the forum for the resolution of disputes. Concern is properly directed to unreasonable conduct in the course of litigation which leads to unnecessary or prolonged trials. However, the judicial system is here to serve the public and no barriers to access should be imposed by warnings as to cost consequences arising from the court's assessment of how litigants should conduct their business.⁹⁸

The courts have also been reluctant to employ their powers to deny costs because a party has refused to admit a matter that should have been admitted because of the belief that, within an adversarial system, each party is entitled to put its opponent to the proof of its case.⁹⁹ Similarly, assessment officers and judges have been reluctant to employ hindsight when determining if a matter was necessary for the purposes of assessing costs.¹⁰⁰

Even if legal culture changed and judges became more willing (and lawyers more accepting) of departures from normal costs practices in order to encourage more efficient litigation, there are some structural impediments to increased disciplinary use of costs. The trial judge may fix costs and this is usually done when costs are used for disciplinary purposes, but there is no requirement that this be done. An assessment officer may be in a difficult position to determine whether one of the parties unnecessarily delayed the case.¹⁰¹ Even the trial judge may not be in the position to determine whether discovery was unnecessarily prolonged or unnecessary interlocutory motions were brought. A case management judge who hears all interlocutory motions in a case will be in a better position to make use of disciplinary cost awards.¹⁰² Judges should be clearly required to award costs or make directions for the

on the basis of negligence see *Swiderski v. Bray Engineering Ltd.* (1992) 16 C.P.C.(3d) 46 (Div.Ct.); *Briddlepath Progressive Real Estate v. Unique Homes Corp.* (1992) 12 C.P.C.(3d) 109 (Ont.Master).

⁹⁸ *Bell Canada v. Olympia & York Developments Ltd.* (1994) 17 O.R.(3d) 135 (C.A.) The Court of Appeal in that case did reduce the successful party's costs by one-sixth because of the parties' joint responsibility in prolonging the trial.

⁹⁹ *Foulis v. Robinson* (1978) 92 D.L.R.(3d) 134 (Ont.C.A.)

¹⁰⁰ *Apotex v. Egais* (1993) 4 O.R.(3d) 321 at 331 (Gen. Div.)

¹⁰¹ Zuber concluded: "The assessment officer, who of course is not present at the trial or other proceeding, would find it impossible to assess how long a proceeding ought to have taken when he or she was not present." *Report of the Ontario Courts Inquiry supra* at p. 218.

¹⁰² A case management judge who can hear all interlocutory motions will be in a position to judge the cumulative effects of a party's interlocutory motions and to use costs awards and directions to stop unnecessary motions. For this purpose, it may be best to have only one case management judge who is thoroughly familiar with the case as opposed to teams of such judges. Nevertheless some litigants have unsuccessfully challenged this procedure on the basis that a judge who hears all the motions in the case might become biased in the matter. *Control and Metering Ltd. v. Karpowicz* (1994) 17 O.R.(3d) 432 (Gen.Div.)

award of costs on each motion¹⁰³ and at the end of the trial. This will entail more work, but without such a requirement, it will be difficult for costs awards to be fine-tuned to discourage needless steps in litigation. Requiring costs to be paid forthwith after each motion might discourage some motion abuse and compensate parties that have to respond to unnecessary motions.¹⁰⁴ At the same time, it would not compensate the court system for the significant resources that are devoted to processing and hearing motions.

(ii) Costs to the Court or User Fees

It may be necessary to introduce a new costs rule that would allow judges to order a party or both parties to pay costs to the court for unnecessary procedures, particularly motions. Such a costs rule would amount to a user fee or toll for some court services.¹⁰⁵ These costs would generally be more modest than costs between the parties which include some portion of lawyers fees. Given the court's reluctance to use costs rules for disciplinary purposes, care should be taken to stress that costs to the court will not be ordered on the basis of fault but rather as a tax or toll on certain forms of litigation. Costs to the court would help internalize more of the costs of litigation to the parties as opposed to the public but they would not address the costs that parties can impose on each other by taking unnecessary procedures. These costs must be addressed through the disciplinary use of costs between the parties contemplated under the rules and discussed above.

Costs to the court should not be applied in an indiscriminate manner to all cases because of the public value that is secured by some litigation. Motions that do not attempt to dispose of a case or protect a litigant from irreparable harm would be an appropriate candidate for user fees or costs to the court. As described above, the use of motions have increased dramatically in recent years. A more modest approach would be to require a user fee for motions that require an oral hearing, again bearing in mind that some motions should be exempted from such a rule because of concerns about fairness and efficiency. A user fee on oral motions would encourage the use of written motions which should be handled by the court in a more expeditious manner. In addition to motions, collection cases are prime candidates for costs to the court or user fees. There is little reason why the public should subsidize debt collection through the provision of court services.¹⁰⁶ Costs should be internalized to lenders who are in the best position to take steps to avoid bad debts or charge a premium for their risks. Corporations who frequently

¹⁰³ The present rule requires this to be done only when "the court is satisfied that the motion ought not to have been made or opposed". R. 57.03. In *Axton v. Kent* (1991) 2 O.R.(3d) 797 at 800 (Div.Ct.). Campbell J. noted that "It is a salutary practice to order costs payable forthwith on interlocutory matters unless the justice of the case suggests otherwise. Interlocutory motions afflict parties with needless costs and delay."

¹⁰⁴ R.57.03(2) allows the court to dismiss a case where a party has not paid the costs of a motion.

¹⁰⁵ Some object to user fees or tolls for court services on the basis that the administration of justice is a basic government function. Garry Watson "Comments" in Ontario Law Reform Commission *Study Paper on Prospects for Civil Justice* (1995) at p.295. These objections should be less intense with respect to motions which have increased dramatically in the last twenty years and consume almost as much judicial resources as trials. In other words, costs to the court would allow the government to better target their subsidization of dispute resolution. Michael Trebilcock "An Economic Perspective on Access to Civil Justice" *ibid.* at p. 284.

¹⁰⁶ A Hobbesian might stress the danger of increasing violent forms of debt collection but this seems to be a danger better addressed through the significant resources devoted to policing and the criminal justice system.

engage in litigation could also be required to pay a user fee after a certain number of statement of claims or statement of defences had been entered in a single year. Businesses that developed alternatives to litigation or easily interpreted standard form contracts could have such user fees waived. A costs to the court element could also be added to the offer to settle rule so that a party forced to pay costs under its terms for rejecting a reasonable settlement would also have to be pay costs to the court for a trial that, with hindsight, was not necessary.¹⁰⁷ This might be particularly effective given the enthusiasm with which the offer to settle rule has been applied with respect to costs between the parties.

(iii) The Offer to Settle Rule

The offer to settle rule, along with the disciplinary use of costs discussed above, are the most important departures from the basic rule of costs following the event.¹⁰⁸ As contained in Rule 49, the offer to settle rule requires a successful plaintiff who has rejected a defendant's offer that is more or as favourable as the judgment to pay the unsuccessful defendant's party and party costs from the date of the offer, which must be made at least 7 days before trial and remain open until trial.¹⁰⁹ The effect of this rule can be dramatic given that the bulk of a legal bill including preparation for trial and counsel fees for trial may be incurred after the offer to settle has been made. Under this rule, a plaintiff who is successful on the merits but received an offer as good or better than the judgment would not be indemnified for most of its costs. Moreover, the plaintiff even though successful would have to pay the defendant's party and party costs from the time that the offer was made. This rule is designed to induce plaintiffs to accept all reasonable offers from the defendant instead of going to trial especially in the majority of cases in which the legal costs are a significant factor in relation to the anticipated judgment.

Rule 49 applies not only to encourage plaintiffs to accept reasonable offers from defendants but to encourage defendants to accept reasonable offers from plaintiffs by providing that if the plaintiff makes an offer that is rejected and obtains a judgment as or more favourable then, in addition to the party and party costs the plaintiff would normally recover, the plaintiff should recover solicitor and client costs from the date of the offer.¹¹⁰ This means that the defendant will be penalized for not accepting a reasonable offer by having to pay the fuller indemnity of solicitor and client costs during the time of intensive trial preparation and trial when most legal costs are incurred. Note, however, that this rule does not deter defendants from going to trial if they are relatively certain that they will be successful and are in fact successful. Such defendants may have an incentive to go to trial on the assumption that a significant percentage of their costs will be recovered when the plaintiff loses. Institutional defendants such as

¹⁰⁷ Some American Federal Courts have imposed witness fees and court costs if a trial award does not exceed a rejected offer of settlement. Judicial Conference of the United States *Civil Justice Reform Act Report* December, 1994 at p.16.

¹⁰⁸ The presence of an offer to settle can also be considered in assessing costs under R.57. *S & A Strasser Ltd. v. Richmond Hill* (1990) 1 O.R.(3d) 243 (C.A.); *Douglas Hamilton Design Inc. v. Mark* (1993) 66 O.A.C. 44 (C.A.). See also R.49.13.

¹⁰⁹ R. 49.10(2).

¹¹⁰ R.49.10(1).

insurance companies and governments, who as repeat players may have lower legal costs and greater interest in legal doctrine, may have an additional incentive to litigate. Plaintiffs in turn may be reluctant to settle because of their financial or emotional investment in a case that they have commenced. R.49 may not provide enough incentives to discourage defendants who think that they will succeed from going to trial secure in the knowledge that much of their costs will be paid by unsuccessful plaintiffs. Carefully tailored no way costs rules may be necessary to deter excessive litigation by confident institutional defendants.

One possible effect of Rule 49 may be to increase the number of settlements at the court room door or within weeks of a scheduled trial in order to avoid its costs consequences. The settlement inducing effects of this rule are particularly strong as the trial nears because of the time devoted to trial preparation. Rule 49 applies not only to settlement offers made in the early stages of litigation but to all offers made at least seven days before the commencement of proceedings and which remain open until the hearing commences. An offer made 10 days before trial and accepted on the eve of trial will save the parties the legal costs of going to trial. Nevertheless it may impose costs on the public by disrupting court room schedules. In addition, a case resolved by a late settlement will also have consumed resources such as the hearing of motions and the holding of pre-trial conferences. R.49 may not be optimally structured to save public resources by encouraging early settlements. If R.49 results in late settlements at public expense it could be amended so that it only applies to offers made earlier in the litigation process and accepted before the trial becomes imminent. This could, however, have the off-setting effect of encouraging litigation after the new time limit for the making and acceptance of offers had expired.

The courts have been considerably more enthusiastic about embracing the settlement inducing purposes of R.49 than the other departures from costs in the cause rules outlined above. Courts have been reluctant to exercise their explicit discretion¹¹¹ to depart from the terms of R.49 because the party penalized has acted in good faith in declining the settlement.¹¹² This is a rule that seems to have been accepted into Ontario's legal culture and research is warranted to determine why it has been embraced by judges and lawyers.

Some have argued that R.49 may discourage access to justice by discouraging litigation on the merits and by monetizing all of the values of litigation.¹¹³ Given the rather inflexible application of the rule by the courts, thought should be given to instructing the courts to consider departing from its terms when a party who has refused what turns out to have been a reasonable settlement offer is nevertheless justified in litigating the case because it was a test case, raised a novel point of law or involved other matters of public interest.¹¹⁴

¹¹¹ R.49.10 provides for costs consequences "unless the court orders otherwise" and in any event R.2.03 allows the court to dispense with compliance with the rules "only where and as necessary in the interest of justice".

¹¹² *Niagara Structural Steel Ltd. v. W.D. Laflamme Ltd.* (1987) 58 O.R.(2d) 773 (C.A.); *Jacuzzi Can.Ltd. v. A. Mantella Ltd.* (1988) 31 C.P.C.(2d) 195 (Ont.H.C.); *Berdette v. Berdette* (1991) 3 O.R.(3d) 513 (C.A.); *Canadian Newspapers Co. v. Kansa General Insurance Co.* (1991) 1 C.P.C.(3d) 16 (Ont.Gen.Div.)

¹¹³ Owen Fiss "Against Settlement" (1984) 93 Yale L.J. 1073

¹¹⁴ This would apply mainly to protect a plaintiff who, even if successful on the merits, is faced with the daunting prospect of having to pay the defendant's party and party costs from the date of the defendant's offer. It would be similar to the direction given to courts in s.31 of the *Class Proceedings Act* to depart from normal costs rules or the Ontario Law Reform Commission's proposals to protect litigants with no personal, proprietary or pecuniary

(iv) Conclusions

This section has identified costs following the event as the dominant cost rule. In Ontario, this is supplemented by R.49 which is designed to penalize litigants for refusing settlement offers which turn out to have been as good or better than awards received at trial. Courts have embraced the settlement inducing purposes of R.49 but have been much more reluctant to employ other costs rules which allow parties and lawyers to be penalized for unnecessary procedures and delay in litigation. Courts should be encouraged to assess costs at the conclusion of each motion and trial and to impose disciplinary costs award when a party or a lawyer has acted unreasonably. Consideration should be given to allowing courts to require litigants to pay costs to the court or a user fee for certain types of litigation. Motions that do not attempt to dispose of cases or prevent irreparable harm and collection cases, at least where the corporate plaintiff is a frequent user of court services, seem to be the most appropriate candidates for user fees.

(c) STATUTES OF LIMITATIONS

Statutes of limitations may be an important factor in preventing or allowing litigation in the superior courts. In the 1980's, the courts eased some of the barriers to litigation by interpreting limitation periods subject to discoverability principles. This meant that time would not start to run until a plaintiff could reasonably have discovered that he, she or it had suffered from a wrong such as a tort¹¹⁵ or a breach of contract¹¹⁶. This may have played a role in the explosion of claims against lawyers in the late 1980's as much high risk legal work in the property and wills field may have previously been protected by the running of time from the date of the legal services being rendered.¹¹⁷ Similarly, the Supreme Court's decision in the *K.M.* case¹¹⁸ opened the door to civil claims brought by adults based on allegations of childhood sexual abuse. The liberalization of statutes of limitations by discoverability principles may have increased access to justice but it has likely imposed greater burdens on the superior courts in hearing cases made more complex by the fact that the events in question occurred more than 6 years ago. A recent bill to reform limitation periods in Ontario would have introduced a general 2 year limitation period with time running from when the cause of action was discoverable and a 30 year ultimate limitation period that would run regardless of discoverability.¹¹⁹ In cases involving medical malpractice and home improvements, however,

interests from costs. Ontario Law Reform Commission *Report on the Law of Standing* (1989) ch. 6. discussed *supra*, n. 84.

¹¹⁵ *Kamloops v. Nielson* (1984) 10 D.L.R.(4th) 641 (S.C.C.).

¹¹⁶ *Consumers Glass Co. Ltd. v. Foundation Co. of Canada Ltd.* (1985) 51 O.R.(2d) 385 (C.A.).

¹¹⁷ Compare *Schwebel v. Telekes* [1967] 1 O.R. 541 (C.A.) with *Central Trust Co. v. Refuse* (1986) 31 D.L.R.(4th) 481 (S.C.C.).

¹¹⁸ [1992] 3 S.C.R. 6.

¹¹⁹ Bill 99 *An Act to Revise the Limitations Act* 1st reading 3d Session 35th Legislature, Ontario (November 25, 1992) s.15.

the ultimate limitation period would have been ten years.¹²⁰ Ultimate limitation period provide repose for potential defendants, but they also may save court resources in hearing stale claims.

Despite the imposition of discoverability principles, many short limitation periods continue to apply to claims against defendants such as health professionals, insurance companies, the media and public authorities.¹²¹ These limitations have the potential to limit access to justice. A good example would be a case in which an individual was not allowed to sue public officials for damages he alleged he suffered while imprisoned because he brought the action eight months after the events, not six months as required under s.11 of the *Public Authorities Protection Act*.¹²² When short limitation periods do not preclude litigation, they may force plaintiffs to commence formal legal proceedings when they are not sufficiently aware of the facts or still engaged in non-adversarial negotiations with the defendant.¹²³ The Prichard Interprovincial Committee on Liability and Compensation in Health Care reported that short limitation periods for medical malpractice claims may actually "increase the frequency of claims and reduce the quality of claims".¹²⁴ Reform of short limitation periods may not only increase access to justice, but also prevent plaintiffs from prematurely commencing formal litigation and having to litigate the applicability of a short limitation period. At the same time, ultimate limitation periods may have a role in preventing litigation over stale claims.

4. THE AGGREGATION OF DISPUTES

The aggregation of disputes occurs when one lawsuit is used to resolve multiple claims often between multiple parties. The Rules of Civil Procedure encourage aggregation of disputes by allowing multiple claims against multiple parties including counterclaims, cross claims and third party claims.¹²⁵ The theory behind these broad joinder rules, as well as rules providing for class actions and preclusion of litigation because a party should have made a claim or joined a previous action, is that the public good is best served by resolving the most disputes in one lawsuit. The rules of civil procedure, however, recognize that the aggregation of disputes may be subject to a law of diminishing returns. Thus the broad rules for the joinder of multiple claims and parties are subject to a discretion to disaggregate claims if they will

¹²⁰ In British Columbia, there is a 6 year ultimate limitation period for medical malpractice claims. S.B.C. 1977 c.76 s.19.

¹²¹ G. Mew *The Law of Limitations* (Toronto: Butterworth, 1991); J.C. Morton *Limitation of Civil Actions* (Toronto: Carswell, 1988); K. Roach "The Problems of Public Choice: The Case of Short Limitation Periods" (1993) 31 Osgoode Hall L.J. 721.

¹²² RSO 1980 c.406; *Mirhadizadeh v. Ontario* (1989) 69 O.R.(2d) 422 (C.A.) But see also *Prete v. Ontario* (1994) 16 O.R.(3d) 161 (C.A.) in which it was held that statutes of limitations do not apply to Charter damage claims.

¹²³ Proposals that require plaintiffs to commence litigation with affidavits of documents and statements from witnesses could not easily be applied in cases with short limitation periods because of the need for plaintiffs to act relatively quickly before their claims are statute-barred.

¹²⁴ Prichard *Liability and Compensation in Health Care* (Toronto: University of Toronto Press, 1990) appendix A at p.197.

¹²⁵ R.5.01,5.02,27,28,29.

“unduly complicate or delay the hearing or cause undue prejudice to a party”.¹²⁶ A central question for students of modern civil procedure is whether an appropriate degree of aggregation has been achieved. Proponents of the public law model of adjudication tend to favour aggregation as a strategy for dealing with group rights and complex causality. On the other hand, advocates of corrective justice are suspicious that cases with multiple claims and multiple parties may strain court resources and distort the corrective functions of civil litigation.

(a) STANDING

It is not likely that the recognition of public interest standing for a party not directly affected by impugned legislation has dramatically increased caseloads given that less than 1% of claims commenced in a study conducted for the Civil Justice Review involved governmental relations that may be affected by public interest standing.¹²⁷ In any event, public interest standing is now being applied by the courts quite strictly in a manner which may, if anything, have the unintended effect of not allowing a public interest litigant to bring claims on behalf of a larger group and by doing so result in a multiplicity of individual proceedings. In two recent cases, the Supreme Court denied public interest standing on the basis that it was possible that the impugned legislation would be challenged by a directly affected person.¹²⁸ This conclusion could be justified as required by corrective justice, but the Court actually emphasized efficiency. For example, Cory J. warned that “it would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning organizations...it would be detrimental, if not devastating, to our system of justice and unfair to private litigants”.¹²⁹ Ironically, his decision not to grant a public interest organization standing to challenge the constitutionality of new refugee procedures meant that this issue would not be decided by the highest court in a timely manner, but rather litigated through the lower courts in a multiplicity of cases often involving interlocutory motions. As recognized by L’Heureux-Dube J. in a recent dissent, granting public interest standing can in some cases contribute to efficiency by preventing a multiplicity of suits.¹³⁰

Granting intervenor status may also increase the ability of courts to decide the wider implications of the issues before them and perhaps prevent the need for separate litigation. At

¹²⁶ R.5.05.

¹²⁷ Twohig, Baar, Meyers and Predko, “Empirical Analyses of Civil Cases Commenced and Cases Tried in Toronto, 1973-1994”, *supra*, at p. 120.

¹²⁸ *Canadian Council of Churches v. Canada* (1992) 88 D.L.R.(4th) 193 *Hy and Zels Inc. v. Ontario* (1993) 107 D.L.R.(4th) 634. For criticism of these cases see K. Roach *Constitutional Remedies in Canada* (Toronto: Canada Law Book, 1995) at 5.230-5.260; June Ross “Standing in Charter Declaratory Actions” (1995) 33 Osgoode Hall L.J. 151.

¹²⁹ *Canadian Council supra* at 204

¹³⁰ *Hy and Zels supra* at 652-3.

the same time, however, courts are sensitive that granting intervenor status not cause injustice to the parties by unnecessarily adding to the length and complexity of the proceedings.¹³¹

(b) CLASS ACTIONS

The experience in Quebec suggests that the passage of Ontario's *Class Proceedings Act* in 1992 is unlikely to place severe demands on the courts. The complexity of such proceedings including the new role that judges must play in certifying and supervising class proceedings should not, however, be underestimated. In any event, the Act is clearly designed to increase access to justice even if this does entail greater use of judicial resources.

As with public interest standing, a legitimate concern is not so much with too much public law litigation, but with too little. In other words, judicial fears of aggregating claims in class actions may have the unintended effect of imposing greater costs on the judicial system by requiring a multiplicity of actions over time that could have been more efficiently determined in one complex proceeding. In *Sutherland v. Canadian Red Cross*¹³², the court refused to certify a class proceedings on behalf of those who received blood infected with HIV from the Red Cross despite noting that 84 separate actions claiming an aggregate \$1.75 billion had already been commenced against the Red Cross in Ontario with the potential for more than 200 more similar actions. Montgomery J. rejected the plaintiff's proposed approach of trying common issues before individual issues of causation despite noting American authority which suggested that certifying a class action in such circumstances might "foster settlement of the case with advantage to the parties and with great saving in judicial time and services."¹³³ The court's concern with judicial economy focused on the difficulties of supervising what would have undoubtedly been a complex class action. The court did not appear to consider the effects that allowing a multiplicity of individual cases would have on judicial economy. These individual proceedings would result in multiple trials with motions and pre-trial conferences on similar issues. Moreover, these trials could result in inconsistent judgments and numerous appeals. Even when Montgomery J. certified a class proceedings on behalf of all women who received silicone gel breast implants, he stressed access to justice issues and did not seem to recognize that aggregation of claims in one complex case as opposed to many individual cases could promote judicial economy.¹³⁴ Of course, a class action will not necessarily eliminate

¹³¹ *Peel v. Great Atlantic and Pacific* (1990) 74 O.R.(2d) 164 (C.A.).

¹³² (1994) 17 O.R.(3d) 645 (Gen.Div.). See also *Abdool v. Anaheim Mgmt. Ltd.* (1995) 21 O.R.(3d) 453 (Div.Ct.) denying certification on behalf of 300 members of a proposed class of investors. O'Brien J. did however suggest alternative methods of aggregation such as intervention under R.13; appointment of a single judge to case manage all the proceedings under R.37.15(1); consolidation of the cases under R.6.01; application for the interpretation of a common contract under R.14.04 or determination of common issues of law or special cases under R.21 or R.22. Moldaver J. suggested that allowing individual actions and discoveries might promote judicial economy by filtering out weak cases *ibid.* at 475-6, but it is unlikely that all 300 potential plaintiffs will be so filtered out.

¹³³ *Re A.H. Robbins Co.* 880 F.2d 709 at 740 (4th Cir.) See also Peter Shuck *Agent Orange on Trial* (New Haven: Yale University Press, 1987); Jack Weinstein *Individual Justice in Mass Tort Litigation* (Evanston: Northwestern University Press, 1995).

¹³⁴ With respect, it is submitted that Montgomery J. was only focusing on the individual case before him when he concluded: "There is no judicial economy to certifying these two claims as a class action" *Bendall v. McGhan Medical Corp.* (1993) 106 D.L.R.(4th) 339.

other related claims because every member of the class retains the right to opt out of the litigation and proceed on their own.¹³⁵

In both the tainted blood and breast implant cases, aggregation of claims through a class action arguably could have prevented the need for a multiplicity of individual proceedings. Litigation of common issues first would clarify the settlement value of the individual cases so that judicial determination of issues specific to each member of the class might never have to occur. Canadian judges in both standing and class action cases may too easily dismiss aggregation in public law litigation as a drain on judicial resources in the particular case when aggregation may be the most efficient judicial response to mass wrongs. At the same time, however, Canadians should not lose sight of the fact that prompt legislative intervention with a compensation scheme will often be the most efficient response to mass wrongs.

(c) PRECLUSION BY PREVIOUS LITIGATION

One means to encourage the aggregation of claims is to apply cause of action and issue estoppel broadly.¹³⁶ By preventing re-litigation, these doctrines conserve judicial resources and relieve parties of the costs of multiple lawsuits. In traditional Anglo-Canadian law, issue estoppel has been applied narrowly so that it only applies in cases of mutuality where the parties or their privies would be bound by a determination of an issue either way.¹³⁷ This restrictive requirement is under attack and has in practice largely been abandoned.¹³⁸ Courts in Ontario will generally hold that it is an abuse of process to allow a defendant to re-litigate an issue that had previously been decided against it, even if the previous litigation involved a different party.¹³⁹ This represents an example of the courts refusing to allow both its resources and the plaintiff's resources to be spent on re-litigating an issue even though the defendant is more than willing to re-litigate.

Recognition of non-mutual offensive issue estoppel saves resources but it also creates a free rider incentive in which a plaintiff may have an incentive to not join in litigation against a defendant in order to wait and see if it can capitalize on a favourable outcome. If the defendant loses, then the wait and see plaintiff can claim offensive non-mutual estoppel and prevent the defendant from having a second opportunity to litigate the same issue. If the defendant wins, however, the plaintiff still retains its rights to bring a subsequent suit and not be bound by the first verdict. So far Ontario courts have punished wait and see or free rider plaintiffs who seek

¹³⁵ *Class Proceedings Act* S.O. 1992 c.6 s.9.

¹³⁶ Cause of action estoppel occurs when a court bars litigation on the basis that the same claims between the same parties or their privies have already been litigated or should have been litigated. Issue estoppel, as traditionally conceived, is similar except to the extent it precludes the re-litigation of single issues that were resolved in previous litigation between the two parties or their privies.

¹³⁷ *Angle v. Minister of National Revenue* [1975] 2 S.C.R. 248; *Verlysdonk v. Premier Petrenas Construction Co.* (1987) 60 O.R.(2d) 65 (Div.Ct.).

¹³⁸ *Parklane Hosiery v. Shore* 439 U.S. 322 (1979). See generally Garry Watson "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1989) 69 Can.Bar Rev. 623.

¹³⁹ See, for example, a case in which a defendant in a shopping centre was not allowed to re-litigate the issue of its liability for a fire when subsequently sued by other tenants of the shopping centre. *Nigro v. Agnew Surpass Shoe* (1977) 18 O.R.(2d) 215 (S.C.) Courts have been less willing to stop a plaintiff from re-litigating by suing different defendants. *Altobelli v. Pilot Insurance* (1989) 34 C.P.C.(2d) 193 aff'd [1991] 3 S.C.R. 132.

to capitalize on a previous verdict by requiring them to pay the defendant's solicitor and client costs. The rationale is that even though the wait and see plaintiff is successful, he or she should have joined its claim in the first action and has needlessly forced the defendant to defend a second action.¹⁴⁰ This protects the defendant, but not the court, from the costs of not aggregating claims and parties in the first action. Moreover, it would not apply in cases where the defendant was successful in the first action but has to re-litigate the same issue when a wait and see litigant brings a second action on the same issue. A more efficient alternative may be to hold a wait and see plaintiff who cannot advance a good reason for not joining in the first action bound by the decision in the first action regardless of its results.¹⁴¹ This would force wait and see plaintiff to become involved in the first litigation, making that litigation more complex through the addition of parties. It would have the advantage, however, of making subsequent litigation on the same issue unnecessary.

(d) POSSIBLE DANGERS OF INCREASED AGGREGATION

Increased willingness to aggregate claims has the potential for saving judicial resources by deciding in one case claims that would otherwise be disputed in a multiplicity of separate actions. As with modern joinder rules, however, it should be recognized that at some point the efficiency value of increased aggregation will be outweighed by the complexity of hearing more complex claims. Determining when the benefits of aggregation will be outweighed by the costs of complexity is, however, a difficult enterprise.

Barbara Holman in her empirical study of cases in Niagara North found that 95.2% of cases with multiple parties had been inactive for a year and half as opposed to 76.2% of cases with only two parties. She suggests: "One possible explanation is that 'multiple parties' is an indicator of case complexity. The more people involved, the more factually and perhaps legally complex the action may be. As well, it may be more difficult for several clients to reach decisions regarding settlement or trial preparation and to coordinate correspondence between them and set hearing dates if parties are to be present."¹⁴² An Australian study found that cases with third party claims took 752 days to dispose of as compared to 568 days for cases without third party proceedings.¹⁴³ A study conducted for the Civil Justice Review similarly found that cases commenced with multiple claims in the form of counter, cross or third party claims took longer to dispose of than the average case. Time to disposition in all cases commenced was 180 days for the median and 1038 days for those at the 90th percentile while the same figures for cases commenced with counter, cross or third party claims were

¹⁴⁰ *Germesheid v. Valois* (1989) 68 O.R.(2d) 670 (H.C.).

¹⁴¹ Discussed in obiter in *Bomac Construction v. Stevenson* (1986) 48 Sask. R. 62. (Q.B.) Watson terms this a "draconian sanction" but concedes it is based on the wait and see plaintiff's own abuse of process. "Duplicative Litigation" *supra* at p.664. He suggests that a better approach would be to use the first judgment as *prima facie* evidence subject to rebuttal.

¹⁴² "Pace and Patterns of Civil Litigation" (1986) 6 Windsor Y.B. Access to Justice 194 at 225. For an argument that increased aggregation under modern rules of civil procedure has had the unintended effect of increasing costs and delay see Stephen Subrin "How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective" (1987) 135 U.Penn.L.Rev. 909.

¹⁴³ Ross Cranston et al. *Delays and Efficiency in Civil Litigation* (Melbourne: Australian Institute of Judicial Administration Incorporated) at p.52.

689 and 1624 days respectively.¹⁴⁴ Decreased speed for more complex cases that went to trial was also evident. Cases that went to trial were disposed at a median rate of 799 days and a 90th percentile rate of 1659 while the same figures for cases with cross, counter or third party claims were 978 and 1856 days respectively.¹⁴⁵ It appears that cases made more complex by multiple claims will take longer. This in itself is not a fatal objection because such cases may still save resources by precluding the need for multiple actions.

More disturbing is the possibility that more complex cases will have lower settlement rates. Cases with cross, counter or third party claims constituted 9.8% of the 2166 cases commenced in the Civil Justice Review study but 28.3% of the 1320 cases tried.¹⁴⁶ This suggests that cases made more complex by multiple claims may not only be slower to settle but also less inclined to settle and more likely to go to trial. As Holman has suggested, this may reflect the difficulty of negotiations between multiple parties and reaching compromises on multiple claims. In short, complex claims with multiple parties may be more difficult to settle and take longer. Nevertheless, it is not clear that aggregation of claims should be resisted on this basis because that aggregation could itself prevent other cases from going into the system and to trial. Unfortunately it is difficult to measure how many separate actions are precluded by resolving more complex aggregated claims and at what savings to litigants and courts. More research should be conducted to determine whether the financial costs to parties and the courts of aggregating claims are outweighed by the financial benefits of preventing a multiplicity of proceedings. Such research could focus on corporations faced with multiple claims and should be sensitive to both the costs of settlement and the costs of litigation. Even if the financial costs of aggregation outweigh its benefits, some calculus to weigh the costs of aggregation against its social benefits will still have to be developed. In some cases, such as consumer class actions, society may be willing to bear the costs of more complex proceedings for the sake of increasing access to justice. In other contexts such as commercial litigation, it may not.

(e) CONCLUSIONS

Courts could encourage increased aggregation of claims not only through permissive joinder rules but through strategic granting of public interest standing, certification of class actions and broader use of issue estoppel. This may not only increase access to justice, but also result in the more efficient resolution of the mass disputes that increasingly characterize modern society. At the same time, it is possible that reductions of settlement rates and increases in disposition time in more complex cases may outweigh the financial benefits achieved by preventing a multiplicity of simpler proceedings. If this is so, then the broad orientation of modern joinder rules is in question and courts should consider ordering relief from joinder to make cases simpler to settle and quicker to resolve.

¹⁴⁴ Twohig, Baar, Meyers and Predko, "Empirical Analyses of Civil Cases Commenced and Cases Tried in Toronto, 1973-1994", *supra*, at p. 131. The figures for all cases commenced supplied by John Twohig, June 23, 1995.

¹⁴⁵ *Ibid.* at p. 133. Note that the former set of figures may only be for negligence claims.

¹⁴⁶ Twohig, Baar, Meyers and Predko, "Empirical Analyses of Civil Cases Commenced and Cases Tried in Toronto, 1973-1994", *supra*, at p. 125 (as amended).

5. FACT-FINDING IN THE SUPERIOR COURTS

The Ontario Rules of Civil Procedure allow a variety of methods for litigants to resolve their cases without a full trial with *viva voce* evidence after full written and oral discovery. The most important of these is the ability to use applications which allow the case to be decided without formal discovery and on the basis of written affidavits perhaps supplemented by cross-examination on the affidavits. In addition, a party can have an issue of law determined before trial or apply for summary judgment. Rules in British Columbia and Manitoba provide for summary trials which allow judges to decide disputed issues of fact on the basis of affidavits. All of these departures from a full trial can be initiated by the plaintiff or, with the exception of applications, by the defendant and are subject to challenge by the other party and review by the court.

All of the above procedures allow cases to be decided without full discovery or the hearing of oral evidence and as such promise to reduce delay and costs to both the parties and the public. These procedures may increase access to justice as long as justice is not thought to depend on the traditional trial process of oral discovery and oral testimony at trial. They also accord with an emphasis on public law litigation in which courts are less concerned about who did what to whom in the past and focus on interpreting legal documents and articulating legal norms to guide future behaviour. At the same time, however, the tradition of the oral trial and the intensive discovery that is thought necessary to conduct a continuous oral trial has deep roots in Ontario's legal culture. Although the rules can be changed to provide even more alternatives to the full oral trial (ie. by adopting British Columbia's summary trial rule), they already allow many such departures. Lawyers, judges and litigants must be convinced of the fairness and practicality of both the existing alternatives to a full oral trial, as well as any new summary trial procedure.

(a) APPLICATIONS

Excluding family law applications and probate applications which are administrative and generally do not consume court time, there were 110,327 statements of claims as opposed to 13,866 applications filed in 1989/90 while in 1993/94 there were 60,878 statements of claims as opposed to 8,925 applications.¹⁴⁷ This indicates that the relative use of applications as opposed to actions has increased slightly from 12.5% to 14.6% of all originating motions filed. Unfortunately data is not available which allows for direct comparison of the time that courts devote to hearing cases heard by way of action or application but the common perception is that the latter are much more expeditious in terms of both court and party resources. Similarly, it is not presently known what number of proceedings commenced by way of application are converted into actions at a later stage of the proceedings.¹⁴⁸

The use of applications has increased dramatically since the introduction of the new rules in 1985 and decisions in recent years have also encouraged the use of applications. In *McKay*

¹⁴⁷ *Court Statistics Annual Report 1993/94 Provincial Summary* at p.9. Before the 1985 rules, the use of applications in civil matters was minimal. For example, in Toronto in 1973/74, there were about 200 civil applications. Twohig, Baar, Meyers and Predko, "Empirical Analyses of Civil Cases Commenced and Cases Tried in Toronto, 1973-1994", *supra*, at p. 89.

¹⁴⁸ R.38.10(1)(b)

*Estate v. Love*¹⁴⁹, it was held that while R.14.05(3)(h) allowed any matter to be heard by application “where it is unlikely that there will be any material facts in dispute”, this section is not a precondition for an application so that any matter specifically enumerated could be heard by application even though there may be material facts in dispute. The categories of cases specifically enumerated in R.14.05 are quite broad including most estate, trusts and property cases; “the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution”¹⁵⁰ or requests “for a remedy under the Canadian Charter of Rights and Freedoms”¹⁵¹

All of the enumerated categories fall under a broad definition of public law adjudication as the common thread appears to be the interpretation of some authoritative legal text from constitutions to contracts. The use of applications in Charter matters has been resisted in some cases but has the potential for increasing access to justice by allowing quicker and cheaper trials on the basis of affidavit evidence.¹⁵² Applications may in some contexts compare favourably with administrative processes and hearings. For example, a challenge under the Ontario Human Rights Code to the Leonard Foundation Trust was recently heard by way of application to determine a legal question without having to wait years for the facts of the case to be determined in proceedings before the Ontario Human Rights Commission.¹⁵³

Another case that may encourage increased use of applications is the recent decision in *E.J. Hannafin Assoc. v. Esso Canada*.¹⁵⁴ In that case, Blair J. rejected previous authorities which held that applications should not be used if they would not end a dispute and could result in the fragmentation of a trial. In the result, he stated that an issue of contractual interpretation could be decided by way of an application because no material facts were in dispute on that issue and a decision on the legal issue might resolve the dispute between the parties without requiring them or the court to spend the time and money required to determine disputed questions of fact by way of an action following full discovery. The use of applications in this way resembles the ability of a party under R.21 to have a question of law resolved “where the determination of

¹⁴⁹ (1991) 6 O.R.(3d) 511 (Gen.Div.) affirmed 6 O.R.(3d) 511 (C.A.) The courts in British Columbia, perhaps because of the availability of summary trials to be discussed below, appear to take a more restrictive approach to the use of applications converting them into actions whenever a “reasonable doubt” as to the necessity of a trial is raised. *Douglas Lake Cattle Co. v. Smith* (1991) 54 B.C.L.R.(2d) 52 at 59 (C.A.).

¹⁵⁰ R.14.05(3)(d).

¹⁵¹ R.14.05(3)(g.1) This was added in 1991 partly in response to some judicial reluctance to hear Charter matters by way of the quicker and less costly application procedure.

¹⁵² In *Canadian Newspapers Co. v. Canada* (1985) 16 D.L.R.(4th) 642 at 657-8, the Ontario Court of Appeal upheld the use of an application in a Charter matter stating: “It is important that persons who allege that their rights under the Charter have been infringed should have an opportunity of having their legal position determined expeditiously.” See generally Kent Roach *Constitutional Remedies in Canada supra* at 5.510-5.530. In *Energy Probe v. Canada* (1989) 68 O.R.(2d) 449 (C.A.), however, a Charter challenge commenced by way of application was converted on consent of all parties to an action in part to hear conflicting evidence on the s.1 issue. See also *Re Seaway Trust Co* (1983) 41 O.R.(2d) 532 (C.A.) (application not appropriate where disputed issues of fact).

¹⁵³ *Canada Trust Co. v. Ontario (Human Rights Commission)* (1990) 74 O.R.(2d) 481 (C.A.).

¹⁵⁴ (1994) 17 O.R.(3d) 258 (Gen.Div.).

the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs".

Greater use of applications based on written materials will save court time devoted to hearing oral evidence. Motions are heard using the same procedures used in applications and in 1993/94 close to 108,000 motions were heard¹⁵⁵ with a total of 31,621 hours of court time being devoted to them.¹⁵⁶ At present not enough is known whether the use of applications as opposed to actions will reduce the time that lawyers spend on a case. One American study found that lawyers on average devoted 11 hours to an average brief and concluded:

the American practice of putting most legal arguments in writing (as compared to the greater emphasis on an oral tradition in England), while it may result in efficiencies in judicial time, probably creates substantial inefficiencies in lawyer time...One implication of our analysis is that the greater the reliance on written materials, the more costly the process for the participants. Obviously, this raises the question of weighing the institutional costs of spending time hearing oral arguments against the participant costs of preparing written materials.¹⁵⁷

Similarly, concerns have been raised in England about the costs of preparing witness statements. In Ontario, factums used in applications are supposed to contain only a concise statement, without argument, of the facts and the law relied upon.¹⁵⁸ Page limits on factums and affidavits could be set and enforced by way of a tax to the court on excess pages. This could save not only judicial time, but also the money that clients must pay to have such legal materials prepared.

Applications may be time consuming if extensive use is made of the ability to cross examine deponents on their affidavits¹⁵⁹ or to examine witnesses¹⁶⁰ so there is a danger that some of the time saved in eliminating discovery and the hearing of oral evidence would be consumed in drafting elaborate affidavits, cross-examining deponents or bringing interlocutory motions to convert applications into actions. At the same time, however, it would be premature to dismiss applications as a means to save both judicial and litigant resources. Applications do not require a formal discovery process with the relevant affidavits and materials simply being exchanged. Even cross-examination of a deponent on an affidavit should be more efficient than wide-ranging oral and written discovery followed by cross-examination at trial. Some would argue that applications devalue the quality of fact-finding but such a conclusion would depend on the assumption that adjudicative facts of who did what to whom were always in dispute and always the most important element of the case. On the other

¹⁵⁵ *Court Statistics Annual Report Provincial Summary.*

¹⁵⁶ Twohig, Civil Justice Statistical Information in Ontario (January 20, 1995, internal working paper, on file with Ministry), *supra*, n. 34, tab 2.

¹⁵⁷ Herbert Kritzer et al. "Understanding the Costs of Litigation: The Case of the Hourly-Fee Lawyer" [1984] Am.Bar F.R.J. 559 at 594.

¹⁵⁸ R.38.09.

¹⁵⁹ R.39.02 places various restrictions on the timing of cross examination on affidavits in applications and motions. Thought could be given to extending the obligation in 39.02(4) to pay the costs of parties cross-examined and to supply them with transcripts so that they apply to applications.

¹⁶⁰ R.39.03. Explicit costs sanctions for abuse of this procedure could be added.

hand, applications are particularly effective if the determination of legislative facts about the proper interpretation and effects of a law are the most important factor in a case. In this way, an application may produce a ruling that helps the public resolve other disputes.

What steps could be taken to encourage greater use of applications? Rules 14 and 38 could be amended to widen the availability of applications or at least to codify cases such as *Mackay Estate* and *E.J. Hannafin* discussed above. Another approach would be explicitly to state in R.57 that a party who proceeds by way of action when an application would suffice can be denied costs.¹⁶¹ A party could also be required to pay the court the costs of having to hear oral evidence when affidavits would suffice. Even more radically, the rules could be changed to make applications as opposed to actions the assumed procedure. Litigants could be required to pay the increased court costs of proceeding by way of an action unless they could demonstrate hardship. This proposal would encounter resistance from many who believe that hearing oral testimony is a fundamental aspect of fairness in civil litigation. Nevertheless, many important decisions in our lives are based on written materials and the Civil Justice Review should not assume that actions are always necessary to ensure fairness.

Despite the above proposals, it should not be assumed that changing the legal rules governing the use of applications will necessarily change practice. Steps must be taken to make lawyers more aware of the benefits of proceeding by way of application.¹⁶² Somewhat ironically, delay in the court's ability to hear actions may encourage the use of applications. As delay and backlog clears up, it will be more important that procedural and educational measures be taken to increase the use of applications.

(b) STATED QUESTIONS OF LAW

Rule 21 enables parties to determine legal issues before trial on the traditional grounds that the pleadings disclose no cause of action as well as on the more innovative grounds that the determination of a question of law "may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs."¹⁶³ The ability to fragment a civil trial and obtain interlocutory rulings and even appeals on disputed questions of law stands in stark contrast to the policy in criminal law that trials should not be fragmented and almost all appeals taken from a final verdict. These contrasting approaches to fragmentation reflect a variety of factors including the social interests in reaching a final verdict and not unreasonably delaying criminal trials, and an increased willingness in the civil process to fragment trials in the hope that this will allow the parties to settle their dispute without a full trial.

Little is known about the actual effect that determining issues before trial has on costs and efficiency in the civil process. Fragmentation could result in a duplication of effort if the parties go on to litigate the merits after a preliminary legal question has been decided and perhaps appealed. On the other hand, determination of a preliminary legal question may eliminate uncertainty about the law and make it easier to settle a case. Much would depend on

¹⁶¹ There is precedent for such a ruling, albeit somewhat dated. *Inc. Synod of Diocese of Huron v. Ferguson* (1924) 56 O.L.R. 161 (H.C.)

¹⁶² Most civil procedure courses, (mine included!), focus on the trial of an action and do not devote much time to application procedures.

¹⁶³ R.21.01(1)(a). See also R.22.01(1) allowing the parties to state a special case on similar grounds.

whether parties conceived their disputes to be primarily about legal questions (which could be fragmented and resolved prior to trial) or whether factual disputes persist even after preliminary legal questions have been resolved.

Determining preliminary legal questions may be particularly useful from the perspective of public law litigation. Plaintiffs bringing innovative claims are vulnerable to defendants claiming that their pleadings disclose no reasonable cause of action. On the one hand, this requires the plaintiffs to litigate complex legal issues before they ever get to discovery or trial. On the other hand, this allows ideological or institutional litigants to contest the law without spending the money that is necessary to determine disputed matters of facts. Two recent examples are the *Nelles*¹⁶⁴ and *Jane Doe*¹⁶⁵ cases in which plaintiffs fought extensive legal battles to establish that they had the legal right to sue prosecutors and the police respectively over alleged harms. In one sense, the ability of defendants to bring these interlocutory proceedings may decrease access to justice, if justice depends on the plaintiff's ability to obtain a verdict on the facts of the case. On the other hand, such a procedure may increase access to justice by allowing litigants and courts to expand the contours of legal rights without having to decide the disputed issues of fact in each case.

Courts have kept distinct their roles in determining preliminary questions of law and determining whether there is a genuine factual issue for trial as required under the summary judgment rule. In *Prete v. Ontario*¹⁶⁶, for example, the Court of Appeal stated that it must take pleaded facts as true in a motion to strike out because to go beyond the pleadings would convert the proceedings into a motion for summary judgment without safeguards such as the submission of affidavits. In individual cases there is a risk of duplication should a defendant first bring a motion to strike out the pleadings as disclosing no reasonable cause of action and later bring a motion for summary judgment. This danger is particularly real given the reluctance of courts to strike a pleading out unless it is plain and obvious that it discloses no cause of action.¹⁶⁷ On the other hand, the courts can decide disputed issues of law on a motion for summary judgment.¹⁶⁸ An omnibus motion to determine preliminary legal questions and seek summary judgment may be more efficient in individual cases. At the same time, however, the determination of preliminary legal issues under R.21 may be valuable in adding to the store of legal precedents used for bargaining in the shadow of the law. In contrast, most summary judgment decisions will be fact-specific and of value to the parties alone. Parties should be able to obtain a pre-trial resolution of a stated question of law in cases in which the legal issue is one of public importance.¹⁶⁹ If the matter is only important to the immediate

¹⁶⁴ (1989) 60 D.L.R.(4th) 609 (S.C.C.).

¹⁶⁵ (1990) 74 O.R.(2d) 225 (Div.Ct.).

¹⁶⁶ (1993) 16 O.R.(3d) 161 at 171.

¹⁶⁷ *Hunt v. Carey Canada Ltd.* (1990) 74 D.L.R.(4th) 321 (S.C.C.); *R.D. Belanger v. Stadium Corp.* (1991) 5 O.R.(3d) 778 (C.A.); *Temilini v. Ontario Provincial Police Commission* (1990) 73 O.R.(2d) 664 (C.A.).

¹⁶⁸ R.20.04(4)

¹⁶⁹ Litigants may be less likely to bring an omnibus motion on legal and factual sufficiency because it would require the use of affidavit evidence and possible cross-examination on the affidavits and, under present summary judgment rules, subject the applicant to possible solicitor and client costs. An omnibus motion may decrease costs in individual cases, but prevent the resolution of legal issues for the benefit of the public.

parties, an omnibus motion challenging both the legal and factual sufficiency of the case should be brought.

(c) SUMMARY JUDGMENTS

Ontario has had a broad summary judgment rule since 1985 which allows plaintiffs and defendants to move for judgment on the basis that there is no genuine issue for trial. Unfortunately, statistics are not kept about the use of this procedure so that it is not possible to state with confidence what effect it has had on litigation. The costs sanction in R.20.06(1) of awarding solicitor and client costs against an unsuccessful applicant for summary judgment unless the application was reasonable may have deterred the use of summary judgments.¹⁷⁰ The American summary judgment, after which the Ontario rule was patterned, does not require that an unsuccessful party pay either party or party or solicitor and client costs.¹⁷¹ The cost sanction contemplated in R. 20.06 should be repealed in order to encourage greater use of the summary judgment procedure. Courts would still retain the discretion to make solicitor and client awards in cases of abuse, but the legitimate use of summary judgments would be less likely to be deterred. An application for summary judgment that is dismissed is not necessarily a waste of resources. Judges have managerial powers under R.20.05 to narrow issues, specify facts and schedule trials when a summary judgment is refused or granted only in part.

In *Irving Ungerman v. Galanis*¹⁷², the Ontario Court of Appeal articulated the leading test for granting summary judgment. Morden A.C.J.O. stated that before summary judgment is granted:

It must be clear that a trial is unnecessary. The burden is on the moving party to satisfy the court that the requirements of the rule have been met....the court's function is not to resolve an issue of fact but to determine whether a genuine issue of fact exists.¹⁷³

Following American authority without explicit recognition of the different constitutional status of the civil jury, the Court of Appeal stated that a trial is required to observe the demeanour of witnesses if there is an issue of credibility unless the conflicting evidence can be dismissed as "incredible" or of such a nature that it would entitle the moving party to a directed verdict. On the facts of the case, the Court of Appeal found that the motions judge had erred in dismissing

¹⁷⁰ W.A. Bogart has argued that while this cost provision "deters frivolous invocation, virtually all pre-trial procedures are susceptible to such manoeuvring. Yet it is summary judgment that is singled out with the attendant chilling effect to its use." "Summary Judgment: How Far Have We Come" Law Society of Upper Canada *Civil Litigation Programme* (1989) at p.A-4. The reported cases to date indicate some reluctance by judges to order solicitor and client costs against an unsuccessful applicant for summary judgment. In *Thomas v. Transit Insurance Co.* (1993) 12 O.R.(3d) 721 at 724 (Gen.Div.) Borins J. noted: "there appears to be some conflict between the purpose of R.20, which is to enable a party to avoid a trial when a claim or defence raises no genuine issue for trial and the purpose of rule 20.06(1) which is to discourage the bringing of unnecessary motions under R.20. My perception is that this apparent conflict has caused a dilemma for counsel." *ibid.* at 724.

¹⁷¹ Federal Rules of Civil Procedure R.56; Schwarzer "Summary Judgment Under the Federal Rules" (1984) 99 F.R.S. 465; W.A. Bogart "Summary Judgment: A Comparative and Critical Analysis" (1981) 19 Osgoode Hall L.J. 552.

¹⁷² (1991) 4 O.R.(3d) 545 at 551.

¹⁷³ For a recent case in which the Court of Appeal in a 2:1 decision granted summary judgment see *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995) 21 O.R.(3d) 547.

conflicting evidence as incredible even though there were contradictions in the witness's testimony and "circumstantial features which support, perhaps strongly so, the probability..." that she was wrong. This test is not as restrictive as the pre-1985 test (available only to plaintiffs) or some tests contemplated by lower courts¹⁷⁴, but it does suggest a pronounced preference for trial, particularly with respect to issues of credibility. The Court of Appeal has not interpreted the summary judgment rule as a mandate to decide issues of facts but only to determine whether a genuine issue of fact exists for a full trial. As such, summary trial rules as provided in British Columbia and Manitoba may be necessary if it is thought desirable to have judges on a motion for summary judgment weigh conflicting evidence presented in affidavits and decide disputed issues of fact.

The Simplified Rules Committee has proposed that the summary judgment rule be altered in cases involving claims of \$40,000 or less so that even if a judge decides there is a genuine issue for trial:

the judge shall nevertheless grant judgment, unless

- (a) the judge is unable, on the evidence without cross-examination, to find the facts necessary to decide the issues in the action; or
- (b) it would be unjust to decide the issues on the motion.¹⁷⁵

The first section is ambiguous in its reference to cross-examination. Cross-examination on the affidavits submitted with or in response to a motion for summary judgment is already available under R.39.02 so the reference to cross-examination must be an attempt to require judges to consider the functional benefits of a trial with *viva voce* evidence. As such it is somewhat similar to the idea expressed in *Ungerman* that the trier of fact should be able to observe the demeanour of witnesses under cross-examination in order to determine credibility. This section has the merit of requiring the judge to determine whether there is a functional benefit in requiring the case to go to trial, but it continues to make the traditional assumption that cross-examination at trial remains the best means to determine the truth. A better functional consideration would be whether the respondent can demonstrate that further discovery concerning specific issues may reveal a genuine issue for trial. The second section simply refers to whether it would be unjust to decide the issues on the motion. It merely invites judges to act on their own views about the importance of *viva voce* testimony to justice. Vague rules are a staple of modern rules of civil procedure and it will not be possible to eliminate discretion in the administration of any procedural rule. Nevertheless vague rules are susceptible to nullification by those opposed to the underlying policy of the rule. As always it

¹⁷⁴ *Arnoldson y Serpa v. Confederation Life* (1974) 3 O.R.(2d) 721 (C.A.); *Mensah v. Robinson* (1989) 14 W.D.C.P. 228 (Ont.H.C.). At the same time, the test is not as generous in granting summary judgment as that contemplated in *Pizza Pizza v. Gillespie* (1990) 75 O.R.(2d) 225 (Gen.Div.). In *Pizza Pizza*, Henry J. stated: "the test is not whether the plaintiff cannot possibly succeed at trial; the test is whether the court reaches the conclusion that the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial; if so then the parties 'should be spared the agony and expense of a long and expensive trial after some indeterminate wait.'" Henry J. conceded that conflicting evidence depending on credibility should be determined at trial but added that the judge should take a hard look at the merits to determine if the credibility issue "must be resolved in order to adjudicate the merits." He also stated "apparent factual conflict in evidence does not end the inquiry" and "the court may look at the overall credibility of the plaintiff's action i.e., does the plaintiff's case have the ring of truth about it such that it would justify consideration by the trier of fact."

¹⁷⁵ Proposed R.14.1.07(12) *Report of the Simplified Rules of Civil Procedure Committee* December, 1994.

must be remembered that legal culture plays an important role in determining the success of procedural innovations.

Careful thought should be given before a liberalized summary judgment or summary trial procedure is introduced in simplified rules which only apply to claims under \$40,000. The merits of these procedures suggest that they should be available in all litigation. If there are reservations about the fairness of these procedures, then surely litigants with claims under \$40,000 should not be singled out for such treatment. A \$30,000 claim may be far more important to an individual than a \$100,000 claim to a corporation. Moreover, summary trial procedures may be stigmatized among the profession if they are only available to resolve so-called minor claims.

Another access to justice issue is the fact that the Ontario summary judgment rule is less sensitive than the American federal rule to the potential that a party responding to a motion for summary judgment can be prejudiced by having to respond before oral discovery or even documentary discovery has occurred.¹⁷⁶ As will be seen, the courts in British Columbia under their summary trial procedure have been more sensitive to prejudice that can result from having to respond before discovery. A party faced with a motion for summary judgment or summary trial should be allowed to make the case that some supervised form of discovery is required to answer adequately the opponent's motion.

(d) SUMMARY TRIALS

Since 1983, British Columbia has had a summary trial rule in addition to a rule on summary judgment.¹⁷⁷ The summary trial rule, known as Rule 18A, applies to most proceedings including divorce petitions and actions where a jury notice has been filed.¹⁷⁸ Any time after the delivery of statement of defence, a party can apply for judgment on the basis of a summary trial. Consent of all the parties is not necessary.¹⁷⁹ R.18A(3) governs the evidence at the summary trial and provides: "the applicant and each other party may adduce evidence by any or all of the following: (a) affidavit; (b) an answer, or part of an answer, to interrogatories; (c) any part of the evidence taken upon an examination for discovery..." Hearsay evidence and

¹⁷⁶ The American rule contemplates depositions and answers to interrogatories being considered and the United States Supreme Court has stated that summary judgment, while important, only applies "after adequate time for discovery" *Celotex Corp v. Catrett* 477 U.S. 319 (1986). In contrast, courts in Ontario have stressed that "it is not sufficient for the responding party to say that more and better evidence will (or may) be available at trial. The occasion is now. The respondent must set out specific facts and coherent evidence organized to show that there is a genuine issue for trial." *Pizza Pizza supra*; 645952 *Ont. Inc. v. Guardian Insurance Co.* (1989) 69 O.R.(2d) 341 (H.C.) (an incomplete examination for discovery does not in itself present a genuine issue for trial).

¹⁷⁷ B.C. Reg. 178/83.

¹⁷⁸ Taggart J.A. has stated: "It will be apparent...that the issues brought before the court for resolution under R.18A are infinite in their variety. Applications under the rule, which may be brought at any stage of the proceedings after the Statement of Defence has been filed. The record before the Judge will run from the pleading and a simple affidavit to many affidavits on some of which there has been cross-examination; and on to cases where there has, in addition been complete discovery of documents and examination for discovery." *Placer Development Ltd v. Skylite Explorations Ltd.* (1985) 67 B.C.L.R. 366 at 384 (C.A.) Rule 18A has been used to determine construction lien claims, motor vehicle accident and wrongful dismissal claims but not Aboriginal claims. McLachlin *British Columbia Practice: Issue 23 (Feb./94)* 18A-13.

¹⁷⁹ *Golden Gate Seafood v. Osborn & Lange* (1986) 1 B.C.L.R. 145 (B.C.C.A.)

affidavits on information and belief are generally not allowed. The deponent of the affidavit may be subject to cross-examination including cross-examination in the presence of the judge.

The general criteria for granting judgment in a summary trial are contained in R. 18A(5) which provides:

... the court may grant judgment in favour of any party either upon an issue or generally, unless

- (a) the court is unable on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
- (b) the court is of the opinion that it would be unjust to decide the issues on the application...

Rule 18A(7) allows a judge who cannot grant judgment on a summary trial application wide managerial powers over discovery and subsequent motions including the ability to order "a statement of agreed facts be filed within a fixed time."¹⁸⁰ A judge who hears an application under R.18A may not preside at the trial unless all the parties consent.¹⁸¹

British Columbia courts have considered many matters when deciding whether it is appropriate to resolve a case or an issue by way of summary trial. One practice manual summarizes the considerations considered by courts in summary trial applications as follows:

In deciding whether it would be unjust to give judgment, the Chambers judge is entitled to consider, inter alia, the amount involved, the complexity of the matter, its urgency, and prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceeding and any other matters which arise for consideration on this question.¹⁸²

Courts have generally been reluctant to decide issues under R.18A where there is a direct conflict in affidavit evidence.¹⁸³ This reflects a traditional view, demonstrated in Ontario in cases such as *Ungerman*, that issues of credibility should be resolved by a full trial even though it is possible for a deponent to be cross-examined on his or her affidavit before the judge under the British Columbia procedure. Unlike the Ontario summary judgment rule, courts in British Columbia also have the option of adjourning a summary trial application to allow discovery to proceed if there is a factual basis to believe that discovery will reveal a

¹⁸⁰ Michael Welsh has stated that "counsel should always be aware of, and never underestimate" these managerial powers as they "may well be a means to secure a victory on a later day if the judgment application is itself unsuccessful." For example, they may be used to impose time limits on the close of pleadings and discovery. He adds: "Some counsel have found that, in addition to stripping away the more spurious defences, it is possible on the remaining issues to get a judge on an 18A application to limit the scope of the trial. The judge can order a trial on an issue and can limit the number of witnesses and the length of their testimony. The judge can also order that some of the evidence in chief be provided in written form to shorten the trial." "Judging the Summary Trial Rule" (1986) 44 *The Advocate* 173 at 177-8. Welsh also notes that the rule has been used to dispose of weak issues, force settlement and prevent some adjudication "where the money involved does not merit a full trial." *ibid.* at 180.

¹⁸¹ R.18A(8).

¹⁸² Fraser and Horn *The Conduct of Civil Litigation in British Columbia* (1993) at p.580. McEachern C.J.S.C. has stated "the volume of litigation present before our courts, the urgency of some cases and the cost of litigation, do not always permit the luxury of a full trial with all traditional safeguards in every case, particularly if a just result can be achieved by a less expensive and more expeditious procedure" such as that provided under R.18A. *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989) 36 B.C.L.R.(2d) 202 at 213(C.A.)

¹⁸³ See McLachlin *British Columbia Practice* 18A-40-43; *Jutt v. Doebling* (1993) 24 B.C.A.C. 313 (C.A.)

triable issue.¹⁸⁴ The options of adjourning for further discovery and cross-examining deponents in the presence of the judge have the potential to eliminate many common objections to granting summary judgment.

Rule 18A has been subject to considerable interpretation by the courts in British Columbia. The rule has also been amended several times since its introduction often to clarify matters raised in litigation.¹⁸⁵ This experience may help Ontario to avoid some of the start-up problems encountered in British Columbia. At the same time, however, it suggests that some initial resistance to the summary trial procedure should be expected. The likelihood of resistance would seem to be especially high if summary trials are introduced under Simplified Rules which at the same time eliminate oral examinations for discovery and place strict time limits on cross-examination on affidavits.¹⁸⁶ Given the important role that legal culture plays in the acceptance of procedural innovations such as summary trials, it may be best to rely on incremental rather than radical reforms.

Despite some start-up problems, the British Columbia summary trial is now used frequently. Data collected by the British Columbia Supreme Court in Vancouver in 1991 revealed that about the same number of actions are disposed of by summary trial motions as by traditional trials. This suggests wide-spread use of the procedure especially when it is considered that only 33% of summary trial applications result in a complete disposition. Another 27% of summary trial applications result in an adjournment,¹⁸⁷ 16% result in settlements, 9% result in dismissal of the application in favour of a trial and 8% result in a partial disposition.¹⁸⁸ This suggests that in addition to disposing of significant numbers of actions, summary trial applications may lead to settlements or partial dispositions which narrow the issues.

In most cases, summary trial applications would be heard within a two hour limit set on applications in Chambers and often in less time. The profile of cases heard by summary trial is somewhat different from those heard by actions. Collection cases dominate and account for 43% of all summary trial applications, but only 14.4% of full actions. Summary trials could be quite useful in disposing of the large numbers of collection cases in Ontario courts. Contract cases account for 16% of summary trial applications, family and divorce for 9%, wrongful

¹⁸⁴ An unsupported suggestion that discovery might reveal something is not enough. *Hamilton v. Sutherland* (1992) 68 B.C.L.R. 115 at 119 (C.A.); *MacMillan Bloedel Ltd. v. B.C. Hydro* (1992) 72 B.C.L.R.(2d) 115 (C.A.). In addition, courts have considered whether the party resisting a R.18A application has diligently gone forward with discovery. *British Columbia v. Cressey Development Co.* (1992) 66 B.C.L.R.(2d) 146 (S.C.).

¹⁸⁵ For example, amendments have clarified that the procedure can be used when a jury notice had been served and that material from discovery is admissible.

¹⁸⁶ R.14.1.07(15) as proposed by the Simplified Rules Committee would limit cross-examinations on affidavits to 50 minutes unless the court orders otherwise. Another proposed rule would limit oral argument to 45 minutes. *Report of the Simplified Rules Committee* December, 1994.

¹⁸⁷ Adjournments have been necessary as counsel adjust to the requirements of the new procedure. Adjournments are also the most commonly recorded occurrence under the Toronto case management system. Again, this illustrates the important effect that legal culture as represented by the practices of the bar and bench can have in resisting procedural innovations.

¹⁸⁸ *Summary Trial Data* p.5.206. I gratefully acknowledge the assistance of Shelagh Scarth, Law Officer with the British Columbia Supreme Court in supplying this data.

dismissal for 8% and builder's lien cases for 3%.¹⁸⁹ Summary trials are less useful for personal injury cases which account for only 4% of summary trial applications, but close to 30% of full actions in British Columbia. In short, summary trials seem to be a promising way to dispose of many cases, especially collection cases.

Although it is patterned on British Columbia's Rule 18A, the Manitoba rule on summary trials is simpler in form as it is expressed as a subsection to the province's summary judgment rule. Manitoba rule 20.03(4) provides:

Where the court decides there is a genuine issue with respect to a claim or defence, a judge may nevertheless grant judgment in favour of any party, either upon an issue or generally unless

- (a) the judge is unable on the whole of the evidence before the court on the motion to find the facts necessary to decide the question of fact or law or
- (b) it would be unjust to decide the issues on the motion.¹⁹⁰

There is no single reported case on the Manitoba rule and cases that could invoke this rule have frequently been decided under the basic summary judgment rule. This may reflect a reluctance among the bar and the bench to use a new procedure. At the same time, the basic Manitoba summary judgment rule has been interpreted quite broadly so that many litigants do not perceive that it is necessary to invoke the summary trial provision.¹⁹¹ It should be noted that the Manitoba summary judgment rule is patterned on the Ontario rule, but does not include the specific reference to the award of solicitor and client costs which as suggested above, may have chilled the use of the Ontario rule. The contrast between the frequent use of summary trials in British Columbia and their infrequent use in Manitoba serves as a reminder of the importance of local legal culture in determining the actual effect of procedural innovations.

On balance, Ontario's situation is probably more similar to British Columbia's than Manitoba's and a summary trial procedure could be useful in Ontario. Some initial resistance to summary trials may be expected,¹⁹² but the British Columbia experience demonstrates the utility of summary trials not only in disposing of cases, but also promoting settlements and narrowing issues. Judges would be required to spend significant amounts of time hearing these motions, but a 2 hour limit on summary trial motions would limit the total time spent. Depending on their timing in the litigation process, increased use of summary trials might also decrease judicial resources devoted to pre-trial conferences and motions. It is not known how much clients must pay in preparation costs for summary trials. The fact that only 9% of all summary trial applications in Vancouver were dismissed with no issues being resolved, however, suggests that in the vast majority of cases, a summary trial application is not a waste of client or court resources.

¹⁸⁹ *Ibid.* 5.203 Only 1.3% of actions concern builder's liens.

¹⁹⁰ Man. Reg. 553/88.

¹⁹¹ I gratefully acknowledge the assistance of Professor Karen Busby of the University of Manitoba, Faculty of Law with this matter.

¹⁹² At the same time, however, a summary trial procedure that did not explicitly threaten the use of solicitor and client costs for unsuccessful applications would be an attractive alternative to motions for summary judgment under existing Ontario rules.

(e) CONCLUSIONS

This section has examined various procedures which enable a judge to decide a case without relying on oral evidence after full discovery. Although the introduction of a summary trial rule is promising given the British Columbia experience, changes in legal rules alone will not suffice. The largest obstacle lies with legal culture and in particular attitudes among the bar and bench which favour the use of a full oral trial to decide all disputed issues of fact. It must be recognized that the luxury of a full oral trial after discovery is one that many cannot afford. Moreover, is not always essential for a just resolution of legal disputes.

Procedures such as applications and stated questions of law can allow the parties and the public to benefit from decisions on legal questions without the expense and time required to decide disputed issues of fact which in most cases are only important to the immediate parties. Summary judgments and summary trials may be more limited to the facts of particular cases but they also have the potential to decide legal issues of general importance without the expense of establishing facts through full discovery and oral trials. In any event, such procedures offer an opportunity to dispose of cases more quickly. In order to ensure access to justice and fairness, a respondent to a summary judgment or summary trial motion should have an opportunity to demonstrate reasonable grounds to believe that specified discovery will uncover relevant evidence. The use of summary judgments and summary trials should be carefully monitored in order to determine their actual use and success in disposing of cases or managing cases by, for example, narrowing the issues for subsequent trials.

6. CASE MANAGEMENT, INTERLOCUTORY MOTIONS AND DISCOVERY

(a) THE THEORETICAL SIGNIFICANCE OF CASE MANAGEMENT

Although it is the reform strategy preferred in the United States¹⁹³, the United Kingdom¹⁹⁴ and Canada¹⁹⁵, case management is, in theory, a radical departure from the traditional assumptions and values of Anglo-American procedure. It represents a rejection of the ability of litigants to manage the pace of litigation and a commitment of official resources to managing what had formally been considered a process driven by the private initiative of the parties. Case management may not represent an adoption of an European inquisitorial system¹⁹⁶, but it

¹⁹³ D. Elliott "Managerial Judging and the Evolution of Procedure" (1986) 53 U.Chi.L.Rev. 366; Peckham "A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution" (1985) 37 Rutgers L.Rev. 253.

¹⁹⁴ "There should be a fundamental transfer in the responsibility for the management of civil litigation from litigants and their legal advisors to the courts." Lord Woolf *Access to Justice Interim Report* June, 1995. ch.27 para 1.

¹⁹⁵ The Hughes Committee in British Columbia concluded: "The responsibility for the pace of litigation can no longer be left entirely in the hands of lawyers and their clients. The burdens on our courts system today require that the judiciary assume an active role in seeing that a case, once set for trial, proceeds as expeditiously as possible." *Access to Justice The Report of the Justice Reform Committee* (1988) at p.102. That Committee did recognize that case management may result in judicial intervention in cases that would have settled in any event. The First Report of the Civil Justice Review recognized that "caseflow management involves the transfer of principle [sic] responsibility for management of the pace of litigation to the judiciary" and enthusiastically endorsed this concept. Ontario Civil Justice Review First Report, March 1995 at p.170.

¹⁹⁶ Some more aggressive forms of case management may, however, be quite close. In his interim report, Lord Woolf proposed a case management system that would require judges to assign cases to appropriate tracks, ensure

does represent a significant move away from a laissez faire model of judicial passivity to a mixed economy of official supervision and private initiative in the preparation of cases for litigation or settlement. Some will see this as a belated recognition of the limitations of the adversarial system. Others, however, may be sceptical about authorizing increased public intervention in what has traditionally been a process dependent on the private initiative of the parties. At a time when government is down-sizing and scepticism reigns about the efficiency and efficacy of official intervention, it is ironic that the case management debate has been dominated by uncritical enthusiasm for increased public intervention.

Others see the dangers of case management not in terms of increased public intervention, but rather a diversion of judicial resources from adjudication to management and the promotion of settlement. Owen Fiss, for example, has questioned the assumption that settlement is a desirable outcome on the basis that it is often coerced and a function of the pre-existing resources of the parties. Appealing to a model of public law litigation, he has argued that the task of judges "is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes...This duty is not discharged when parties settle."¹⁹⁷ Although not rejecting settlements outright, Carrie Menkel-Meadow has been critical of the way that judges promote settlement by, for example, asking parties to split the difference without regard to the merits.¹⁹⁸ Judith Resnik has argued that case management strategies convert judges into bureaucratic managers with an interest in inducing settlement as opposed to adjudicating.¹⁹⁹

These critiques are too strong to the extent that they suggest that all private settlements are suspect and that judges can ignore managing complex litigation. They are also more telling in the context of the individual calendar systems used in many American jurisdictions which can result in the case management judge also hearing the case on the merits. This would be unlikely to occur under Ontario's master calendar system and in any event is specifically prohibited under the case management rules used in some Ontario centres. Claims that the Ontario case management rules create an apprehension of bias by allowing one judge to hear all pre-trial motions have been rejected.²⁰⁰ Nevertheless, the Ontario Civil Justice Review should carefully consider the fundamental critiques of case management and the theoretical

that pleadings adequately define the dispute, supervise much discovery, have complete control over the calling of expert evidence and the cross-examination of witnesses on the basis of their witness statements. Lord Woolf *Access to Justice Interim Report* June, 1995. ch.27. It is not a coincidence that Lord Woolf was motivated in part by concerns that European courts would attract litigation if fundamental reforms were not made in the United Kingdom. *ibid.* ch.3 para 28. See generally John Langbein "The German Advantage in Civil Procedure" (1985) 52 U.Chi.L.Rev. 823.

¹⁹⁷ Owen Fiss "Against Settlement" (1984) 93 Yale L.J. 1073.

¹⁹⁸ Carrie Menkel-Meadow "For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference" (1985) 33 U.C.L.A.L.Rev. 485.

¹⁹⁹ Judith Resnik "Managerial Judges" (1982) 96 Harv.L.Rev. 374.

²⁰⁰ In *Control and Metering Ltd. v. Karpowicz* (1994) 17 O.R.(3d) 432 (Gen.Div.) it was held that while the case management judge "may well take into account in subsequent motions the views of the facts and legal issues which she formed in prior motions" this did not amount to a reasonable apprehension of bias because of other safeguards such as the right to seek appointment of a substitute case management judge. The Court also emphasized the need to ensure economy for both the litigants and the courts by preventing a party from moving from judge to judge to argue successive interlocutory motions.

significance of case management before it endorses case management as a new cornerstone of Ontario's civil justice system.

(b) ALTERNATIVES TO OFFICIAL-BASED CASE MANAGEMENT

An alternative to official-based case management has been used in some state systems in the United States and has been endorsed by the American Bar Association. It requires the parties themselves to meet and develop a management schedule for the case. Edward Sherman has commented that this system:

substitutes party driven resolution of pre-trial issues for the judge-led settlement and planning conferences contemplated by the Federal Rules. It offers a number of advantages: ...there is virtually no court involvement, saving court time and putting the burden on the parties to work out the details of the plan (parties would only resort to court authority if they could not agree); the parties are more likely to comply with its terms because they have created and agreed to it; and it provides an early meeting at which discussion of settlement and alternative dispute resolution are required so that neither party need fear appearing weak by choosing to raise these issues.²⁰¹

Alan Lenczner has proposed placing obligations on the parties to file their affidavits of documents and will say statements of witnesses with their statements of claims and defences.²⁰² Along with affidavits of documents, parties could be required to meet soon after the close of pleadings to devise a schedule for oral discovery. Ideally, a party-based system of case management would be compared within the same jurisdiction with a more traditional system of case management involving official intervention. The ABA and Lenczner proposals may not save clients money, but they could save the public much of the expense of administering case management. This is particularly important in Ontario where judges of the Ontario Court (General Division) and not magistrates conduct pre-trial and case management conferences.

Another alternative to official-based case management is to enhance the ability of clients to supervise the way lawyers conduct their cases. Most of the support for case management comes from the conclusion that:

Lawyers cannot always be relied on by themselves to move cases along quickly, engage in early settlement discussion or take other measures designed to save the client's money and facilitate the progress of a case through the courts.²⁰³

Instead of relying on costly official supervision of the lawyer's work, it may be better to educate and empower clients to supervise their own lawyer's work and the progress of the case. After all the client has the best incentive (but not the best information) to supervise the litigation. Lawyers could be required to supply their clients information about official

²⁰¹ Edward Sherman "A Process Model and Agenda for Civil Justice Reforms in the States" (1994) 46 Stanford L.R. 1553 at 1556.

²⁰² Proposal submitted to Ontario Law Reform Commission, February 25, 1991. The requirement to file witness statements may be premature and impose onerous requirements on litigants by front-loading much of the costs of litigation to the time of commencement.

²⁰³ Zuber *Report of the Ontario Courts Inquiry* (1987) at p.185.

expectations for the pace of litigation.²⁰⁴ A variety of remedies should be available to clients if these expectations are not met. They could include the ability of the client to request official intervention such as a case management conference, assessment of legal bills and complaints to the law society. Experienced clients may already have the information and skills to manage their own litigation. In general, further research is warranted to see if party-driven case management is an effective and less expensive alternative to case management which relies on official interventions and pre-trial conferences.

(c) EXPERIENCE WITH CASE MANAGEMENT

Ontario has had a positive experience with case management which has not always been duplicated in other jurisdictions. An early controlled experiment in New Jersey comparing cases subject to pre-trial conferences and those that were not found that pre-trial conferences did not increase settlement rates or decrease the time spent in trials and were less efficient than no intervention because of the extra judicial time devoted to the conference.²⁰⁵ One study of six American federal district courts found that, if anything, the courts that devoted the most time to settlement actually had the lowest settlement rates.²⁰⁶ Another study of state courts in 21 American cities also found that courts which dedicated more judicial resources to settlement activities did not dispose of more cases.²⁰⁷ Despite these largely negative findings, the most common intervention under local plans devised under the *American Civil Justice Reform Act of 1990* remains "the traditional settlement conference with a judicial officer."²⁰⁸

Results in Ontario have been more encouraging. A 1977 study found that 80 cases randomly assigned to pre-trial conferences had a 72% settlement rate prior to trial compared with a 50% settlement rate in the control group. The decrease in trials for case managed cases resulted in a total saving of one third of judicial time in the case managed cases.²⁰⁹ The settlement rates in both cases seem quite low suggesting that the cases may not have been typical. A follow-up study found a pre-trial settlement rate of 79.2% among cases randomly assigned to pre-trial conferences as opposed to 71.8% in the control group with less judicial time again being expended on the cases subject to case management.²¹⁰ The follow-up study

²⁰⁴ This is done under R. 2.04(2) of the Toronto Case Management Rules which requires lawyers to give their clients copies of the schedules for the litigation of fast and standard track cases.

²⁰⁵ Maurice Rosenberg *The Pretrial Conference and Effective Justice* (New York: Columbia University Press, 1964)

²⁰⁶ Steven Flanders "Case Management in Federal Courts: Some Controversies and Some Results" (1978) 4 Just.Sys.J. 161.

²⁰⁷ Thomas Church et al *The Pace of Litigation in Urban Trial Courts* (1978) discussed in Trubek and Cahill "Most Cases Settle": Judicial Promotion and Regulation of Settlement" (1994) 46 Stanford L.Rev. 1339 at 1366.

²⁰⁸ Judicial Conference of the United States *Civil Justice Reform Act Report* December, 1994 at p.6. One change has been the increased use of magistrate judges to conduct these conferences.

²⁰⁹ Michael Stevenson, Garry Watson and Edward Weissman "The Impact of Pretrial Conferences: An Interim Report on the Ontario Pretrial Conference Experiment" (1977) 15 Osgoode Hall L.J. 591.

²¹⁰ A total of 1,062 hours including 161 hours of judicial time for the pre-trial conferences compared to 1,216 hours for the control group not subject to pre-trial conferences. Garry Watson "Judicial Mediation: The Results of a Controlled Experiment in the Use of Settlement-Oriented Pretrial Conferences" (prepared for Law and Society

demonstrated less impressive results and a significant variation between the settlement rates achieved by different judges when they conducted pre-trial conferences.²¹¹ Nevertheless, it does suggest that pre-trial conferences in Ontario can save resources by increasing settlement rates.

Evaluations of pilot case management programmes in Toronto, Windsor and Sault Ste. Marie also reveal some promising figures.²¹² In Toronto, 10% of cases have been randomly assigned to case management and these cases have been disposed at a significantly faster rate than cases not assigned to case management. For example, 98% of cases assigned to fast track case management and 70% of cases assigned to standard track case management are disposed within a year whereas only 40% of cases designated as fast track but not case managed and 20% of cases designated as standard track but not case managed are disposed of within those time frames. Only 10% of standard track case management cases remain undisposed after two years compared to 65% of similar cases not assigned to case management.²¹³ These figures are impressive but unfortunately it is difficult to state with certainty what causes actions subject to case management to be disposed more quickly.

It does not appear that case management in Toronto is relying on pre-trial conferences to induce settlements because only 7.1% of all case management dispositions are by settlement with 31.2% coming from default judgment, 26.2% dismissed by a judge, 11.7% dismissed by a registrar, 9% discontinued by notice and 8.2% disposed by judgment.²¹⁴ Moreover, pretrial conferences account for only 12.7% of the events recorded on case managed files and case conferences account for only 2.7% of the events.²¹⁵ These figures suggest that much of the success of case management cannot be attributed to inducement of settlements at pre-trial conferences. On the one hand, this suggests that the Ontario projects are not susceptible to criticisms that judges are inducing and perhaps coercing settlements. On the other hand, these findings beg the question of how and why case managed cases are ending more quickly.

Annual Meeting, Boston, 1984) at p.7, 14. I gratefully acknowledge Professor Watson's assistance in supplying this information.

²¹¹ As Carrie Menkel-Meadow has observed, judges often have no training in promoting alternative dispute resolution or professional norms for conducting pre-trial conferences. "Will Managed Care Give Us Access to Justice" Prepared for Legal Action Group's Conference on Achieving Civil Justice, London Nov.10-11, 1995.

²¹² The centres were selected to represent large, medium and small centres and they were matched with controls. The Windsor and Sault Ste Marie projects commenced in September, 1990 while the Toronto project commenced in December, 1991. All of the projects assigned cases into one of several tracks each with their own schedules. The schedules in Toronto and Windsor provided for certain times between each scheduled event while the Sault Ste Marie and Toronto family law projects had day one schedules tied to the commencement of the action.

The following focuses on the more extensively evaluated Toronto study, but lower average disposition times are found in the two other pilot projects in which all cases were assigned to case management. Dispositions rates have decreased in Windsor but not Sault Ste. Marie. Joint Committee on Court Reform *Report on Case Management* May 1994 at p.10-11.

²¹³ Quindecia Corporation *Justice In Ontario: A Change of Pace Evaluation of the Ontario Case Management Pilot Projects* October, 1994 at pp.10-11. (henceforth Quindecia Study)

²¹⁴ Quindecia Study p.17.

²¹⁵ *Ibid.* at 19. The most common event is motions to extend time (31% of all events) followed by other motions (25.6%).

At least some of the apparent efficiency of case management may be an artifact of closer and more accurate tracking of cases by the parties and the courts. This hypothesis, although not proven, is supported by the results of an experiment conducted in Toronto in which letters were sent to the parties of 1,405 of the oldest cases only to find that 840 cases were already closed although the court had not been informed of this fact and 275 other cases had already been pre-tried and given dates for trials.²¹⁶ This experiment suggests that the slower rates of non-case managed cases may reflect in part the failure of the parties to notify the courts that the cases had been discontinued, settled or given trial dates. Conversely, the quicker disposition of case-managed cases may reflect the requirements under case management rules for the parties to more closely monitor cases and seek dismissals and default judgment earlier.²¹⁷ An evaluation of the projects found that close to 70% of dispositions are default judgments or dismissals registered by a judge or registrar.²¹⁸ "Since the majority (70 percent)" of case managed cases are disposed within 6 months, "it can reasonably be inferred that the primary intervening factor is the aggressive monitoring of the cases at an early stage as opposed to the prospect of trial which would occur almost 18 months later."²¹⁹ This suggests that the success of case management is not primarily because of settlement conferences or the prospect of firm trial dates, but closer monitoring of the early stages of cases by lawyers, administrators and judges.

The administrative costs of processing cases under case management are slightly higher than cases not subject to case management. For example, the costs of processing case management notices have been estimated at about \$2 a case in Windsor and \$18 in Toronto. Nevertheless, there is a potential for savings of public resources given that cases are generally disposed of more quickly under case management with less resources devoted to processing pleadings, motions or pre-trial conferences.²²⁰

Unfortunately, it is not known whether the administrative savings of case management are also passed on to the parties. Anecdotal information suggested that fewer hours are billed on case managed files²²¹ but an Australian study found that the age of a file had little effect on private costs with the principal determinant being the stage of litigation at which the case is resolved. It found on average 17 hours were devoted to a case resolved at or after a pre-trial conference, 25 hours devoted to those resolved at the commencement of trial and 62 hours devoted to cases that went to judgment after trial.²²² These hourly figures seem low in comparison to the Civil Justice Review's estimate of 90 hours to take a case from initial

²¹⁶ Civil Justice Review *First Report* March, 1995 at pp.157-8.

²¹⁷ Toronto Case Management R.2.06-2.08.

²¹⁸ Quindecia Study *supra* at p.17 37.9% of cases disposed under case management are through a judge or a registrar dismissing a case with 31.2% of cases being disposed by default judgments.

²¹⁹ *Ibid.* at p.36.

²²⁰ Joint Committee on Court Reform Appendix E at p.3.

²²¹ *Ibid.* at p.17.

²²² Australian Institute of Judicial Administration *The Cost of Civil Litigation before Intermediate Courts in Australia* (1992) as reported in Case Flow Management Report to the Courts Administration Division, November, 1993 at p.36.

interview through pleadings and discovery to a pre-trial conference with an additional 60 hours being spent on trial preparation and trial time.²²³ This latter estimate indicates that the disposition of cases after a pre-trial conference will still be quite expensive for clients given the time that lawyers devote to pleadings, motions, discovery and preparation for the pre-trial. Case management is likely to save clients money when it results in more cases being disposed at an earlier stage of litigation. Fortunately, it is at these early stages of litigation that most cases appear to be disposed of under the Toronto case management project.

(d) SCHEDULES, SETTLEMENT AND TRIAL-MANAGEMENT CONFERENCES

One of the difficulties of analysing or predicting the effects of case management is that it encompasses a broad range of interventions. It is crucial that attempts be made to break down what is entailed in case management because the various interventions serve different purposes and require different amounts of resources to implement. For example, requiring parties to meet a schedule may be less expensive than requiring settlement conferences with a judge. Similarly, trial management conferences should affect fewer cases and be more trial-oriented than settlement conferences conducted at the close of discovery.

One intervention that is generally seen as an important component of case management is the assignment of fixed and realistic dates for the completion of various stages in civil litigation. Like students faced with a deadline for an assignment, it is thought that lawyers will more diligently prepare a case if they too have a deadline. Nevertheless, as any teacher can report, students often request extensions and miss deadlines (not necessarily in that order!). Requests for extension of time are the most commonly recorded occurrence on case managed files in Toronto, accounting for 31% of all recorded events.²²⁴ There is some controversy over whether this is a transitional or a chronic problem. If the legal culture absorbs the schedules, extensions should be transitional, but perhaps remain chronic in more complicated cases. Establishing schedules for the completion of pleadings and discovery and fixed dates for pre-trial conferences and trials is probably not an expensive enterprise for the courts but ensuring that the dates remain realistic can be resource intensive because it involves officials hearing requests for extensions and the scheduling of judges. It may be appropriate to require a party requesting an extension to bear some or all of the court costs of the extension.²²⁵

Another important intervention is the pre-trial conference. These are meetings held with a judge who will not be the trial judge to discuss a variety of matters most importantly the possibility of settlement, but also the simplification of issues should the case go to trial.²²⁶ A recent study found that pre-trial conferences accounted for 12.7% of all events recorded in the

²²³ Civil Justice Review *First Report* March, 1995 at p.144.

²²⁴ Quindecia Study at p.19. The next most frequent events were motions (25% of all events); pretrial conferences (12.7% of all events) and motions to dismiss (10.2%).

²²⁵ This could however make parties less willing to have cases placed on fast tracks and could impose additional costs in determining whether the costs sanction was warranted.

²²⁶ R.50.01.

Toronto case management project.²²⁷ Pre-trial conferences are quite resource intensive with 45 minutes of judicial time being allotted in some jurisdictions for each conference and even that time being considered inadequate.²²⁸ Pre-trial conferences can also be costly for the litigants by requiring about 10 hours of lawyer time to prepare memoranda.²²⁹ In addition, the parties and perhaps the relevant experts may attend.²³⁰ The rules provide that the conference can be conducted by telephone,²³¹ but it is not known how much this technology is utilized and at what savings to the clients and the courts.

The effectiveness of pre-trial conferences is a matter of contention. The early Ontario controlled experiments suggest that pre-trial conferences may successfully induce settlements and by doing so, save judicial resources. In 1986, Judge Holland reflected this view when he commented:

In Ontario, pre-trial conferences are frankly settlement-oriented with the role of the judge being that, to a great extent, of a conciliator who discusses the strengths and weaknesses of each side's case, encourages counsel to give their views on liability and damages and finally gives his opinion on the case.²³²

On the other hand, a British Columbia judge, Judge Shaw, after a recent visit to Ontario, concluded that in many cases pre-trial conferences "have become perfunctory and a waste of time and money" for both the courts and clients. There is a need for more controlled evaluation of pre-trial conferences which attempt to measure not only their effects on dispositions, but also their impact on public and client costs. There is a danger that the pre-trial conference may only add an extra step to an already complex litigation process

If pre-trial conferences are maintained or increased, thought should be given to the optimal timing of such conferences. Under case management, they are held after the close of discovery when the clients may have already absorbed a significant portion of the costs of litigation.²³³ The Simplified Rules Committee contemplates an earlier mandatory settlement discussion by telephone between the parties without judicial involvement within 60 days after the close of pleadings.²³⁴ This may be a more effective means to promote settlement at an earlier stage when both the courts and parties have invested fewer resources into cases. Such early

²²⁷ Quindecia Study p.19. Case conferences accounted for 2.7% of all events. In total only 7% of all cases subject to case management were disposed by settlement with most being disposed by default judgments and dismissals. *ibid.* p.17.

²²⁸ Ontario Civil Justice Review *First Report* at p.225

²²⁹ The Simplified Rules Committee has proposed that pre-trial conferences be stream-lined in part by providing that memorandums shall not be provided unless the parties consent. Proposed Rule 14.1.09(2)

²³⁰ Hon. R.E. Holland "Pre-Trial Conferences in Canada" (1980) 7 Adv.Q. 416 at 421-2.

²³¹ R.50.08.

²³² "Pre-Trial Conferences in Canada" *supra*, at 424.

²³³ Cases conferences can, however, be called at any time and the practice directions indicate "judges will be available at the request of counsel at any stage, to assist in settlement discussions with respect to all or any issues in the actions" Toronto Practice Direction 4.

²³⁴ Proposed Rule 14.1.08

settlement meetings would not entail public expense; they could involve mediators and they could also facilitate the discovery process.

There is a danger of confusing the settlement-inducing functions of pre-trial conferences with their role in preparing a case for trial by securing admissions, agreement on evidence and other attempts to narrow the issues. Narrowing the issues and securing admissions although helpful in expediting trials may not be the best way to achieve settlement. These latter matters should probably be dealt with by the trial judge if the master calendaring system used in the Ontario Court (General Division) allows. Having the trial judge preside at a trial management conference would probably increase compliance at trial. Careful attention should be paid to the optimal time to schedule such conferences because they will waste judicial and party resources should the case not go to trial. Perhaps a true trial conference need not be held until the eve of the trial.

(e) MOTIONS

An important goal of case management is to control the amount of pre-trial motions by allowing one judge or a team of judges to gain familiarity with a case and limit excessive motions made by any party. As discussed in section two, motions have increased dramatically in Ontario and consume a large amount of judicial resources. If case management reduces the number of motions made in a case and the time devoted to each motion, this will have a significant and positive impact on court resources.

The Toronto case management rules provide for informal motions which can be filled out on standard forms; faxed to a judge without supporting material and heard in the absence of the public.²³⁵ Not enough is known about the use of such summary procedures, but they have considerable potential. It would save both the court and the parties considerable resources if most motions were filed on standard forms and decided on the basis of written material only. In addition, the effect of having case management judge(s) on the number, speed and expense of motions is not known.²³⁶ Simpler motions should be encouraged by a variety of measures including requiring the parties to pay a fee or tax for motions that do not use a standard form or go over a certain amount of pages or time for hearing. The general rule should be that an applicant should pay costs to the court for motions unless he or she can demonstrate undue hardship or that the motion was made necessary by the responding party's fault. However, care must be taken when attempting to deter motions through user fees or tolls because some motions, such as those for default judgments, summary judgment or stated questions of law, can serve a useful purpose by disposing of a case in whole or part. Motions for interlocutory remedies may enhance access to justice by preventing irreparable harm before the case can be litigated.

Discovery likely generates a significant amount of motions. Some Federal Courts in the United States have experimented with requiring parties to certify that they have made reasonable and good faith efforts to reach agreement with opposing counsel before bringing a

²³⁵ Toronto Case Management Rules Rule 3, Form 3. The Practice notes encourage counsel to use the standard forms for motions "wherever possible to deal with the matter in issue, and with Fax transmission to the Judge and no necessity to attend in many cases, and the use of conference calls, where appropriate." Practice Note 8

²³⁶ Motions other than for extension of time or to dismiss a case still account for 25.6% of all events recorded on case-managed files in Toronto. Quindecia Study at p.19.

motion related to discovery.²³⁷ Evaluations of these and other reforms has not yet been completed, but this requirement has the potential to increase client costs by adding another step in litigation. It may be better to devote resources to devising more economical ways to hear motions or imposing user fees on motions.

(f) DISCOVERY

Discovery can be costly for clients with some commentators arguing that hourly billing may contribute to the length of discovery.²³⁸ When discovery results in motions, it also imposes costs on the public.

Case management attempts to schedule and place limits on discovery. The Toronto case management rules, for example, require a list of documents to be delivered with the pleadings in fast track cases and then schedules discovery to be completed 120 days after the action is commenced or 40 days after the close of pleadings.²³⁹ This is a positive development which can reduce the time required for the discovery of documents at least. Oral discovery of witnesses and experts may, however, not be easily amenable to similar reforms. Alan Lenczner has proposed that parties deliver will say statements for all witnesses with their pleadings.²⁴⁰ This would front-end the significant costs of locating and interviewing witnesses to the very start of litigation. Although certain witnesses can be anticipated and contacted prior to pleading, in some cases it may be difficult to identify all the witnesses and experts or the most important ones until some later date. There are limits to how much discovery can be collapsed into the pleading stage.

A common problem with evaluating either discovery or case management is that each process is thought to serve multiple objectives. One role of discovery is to facilitate settlement by allowing the parties to discover the strength of their own and their opponent's case. Unfortunately, the available empirical evidence suggests that discovery may not facilitate settlement.²⁴¹ Hay has recently suggested that one factor in this may be rules of privilege which allow a party to invest in a case without necessarily providing the information to the other party.²⁴² At the same time, proposals to diminish or eliminate rules of privilege which protect the work product of lawyers might be seen as threatening the adversary system. In any

²³⁷ Judicial Conference of the United States *Civil Justice Reform Act Report* December, 1994 at pp.10-12.

²³⁸ M. Rosenberg and W.R. King "Curbing Discovery Abuse in Civil Litigation: Enough is Enough" [1981] B.Y.L.R. 579.

²³⁹ R.4.01(8) A list of documents does not have to be delivered with the pleadings in standard track cases and the schedule for completion of discovery is 190 days after the action is commenced or 90 days after the close of pleadings.

²⁴⁰ Proposal to Ontario Law Reform Commission February 25, 1991. Lord Woolf has proposed that summary of witnesses statements be exchanged a month after the close of pleadings in fast track cases. In multi-track cases, witnesses statements will generally not be prepared until after the case management conference in order possibly to save the expense of their preparation. Lord Woolf *Access to Justice Interim Report* May, 1995 ch.22 para 14-15.

²⁴¹ W.A. Glaser *Pre-trial Discovery and the Adversary System* (1968); Wayne Brazil "The Adversary Character of Civil Discovery: A Critique and Proposals for Change" (1979) 31 *Vanderbilt L.Rev.* 1295.

²⁴² Bruce Hay "Effort, Information, Settlement, Trial" (1995) 24 *Journal of Legal Studies* 29.

event, as a formal and costly adversarial process dominated by lawyers, discovery is likely not the best and most efficient manner to secure settlements.

Another role of discovery is narrowing issues, securing admissions and eliminating surprise at trial. The role of discovery in eliminating trial by ambush largely depends on the assumption that there should be a continuous oral trial, something that has been contested elsewhere in this paper. Langbein has argued that the parties are not disadvantaged by surprise under the episodic character of fact-finding in the German civil justice system. He argues that "because there is no pretrial discovery phase, fact-gathering occurs only once; and because the court establishes the sequence of fact-gathering according to criteria of relevance, unnecessary investigation is minimized."²⁴³ At the same time, it seems plausible that adjournments of trials because of late discovery can waste the resources of parties and the courts. A party who withholds relevant information should probably be responsible to both the opposing parties and the court for the costs of the delay caused by late disclosure.

Wright has pointed out the difficulties of discovery reform including the dangers of replacing an "unsupervised proceeding" with the greater costs of direct supervision by the courts. Attempts to limit the scope of discovery may only generate more motions to contest the outer boundaries.²⁴⁴ The Hughes Committee proposed the use of discovery conferences before pre-trial judges.²⁴⁵ Lord Woolf has proposed that judges supervise any "extra" discovery beyond the disclosure of documents which a party either relies upon or knows has a material adverse effect on its case.²⁴⁶ These proposals for judicial supervision of discovery would be resource intensive for the public compared to the discovery conferences contemplated under recent amendments to the American Federal Rules of Civil Procedure which require the parties to conduct their own discovery conferences.²⁴⁷ The American discovery reforms including requirements for initial mandatory disclosure have, however, encountered significant resistance from the profession. Justice Scalia for one has warned that they will increase costs for the parties and the public by adding "a further layer of discovery".²⁴⁸ Nevertheless, the requirement that parties attempt to develop their own discovery plan should be tried in Ontario to determine whether this facilitates settlements and reduces the time spent on discovery.

The present state of knowledge does not allow confident predictions about what should be done about discovery. One priority should be to attempt to reduce the number of discovery-related motions because they impose costs on both the parties and the courts. Where possible,

²⁴³ John Langbein "The German Advantage in Civil Procedure" (1985) 52 U.Chi.L.Rec. 823.

²⁴⁴ Edmund Wright "Controlling Discovery Abuse: A Microcosm of Procedural Reform" (1987) 66 Can.Bar Rev. 551 at 558.

²⁴⁵ *Access to Justice The Report of the Justice Reform Committee* (1988) at p. 130.

²⁴⁶ Lord Woolf *Access to Justice Interim Report* June 1995 c.21 paras 22-40. He proposes a dramatic restriction on what documents are discoverable because of concerns about costs and delay.

²⁴⁷ Rule 26(f) of the American federal rules of civil procedure now requires the parties to meet and attempt in good faith to agree to a proposed discovery plan to be filed with the court and setting out the subjects on which discovery may be needed and when discovery should be completed.

²⁴⁸ Amendments to the Federal Rules of Civil Procedure 146 F.R.D. 401 at 510.

bright line rules concerning what is subject to discovery and what is not should be codified²⁴⁹ and not left to often expansive common law definition.²⁵⁰ Moreover, Lord Woolf's proposals to restrict dramatically the discovery of information that is merely relevant but not material to the issues in dispute deserves serious consideration.²⁵¹ Much litigation about the use of material revealed in discovery for other purposes and the scope of privilege might be prevented through clear rules governing discovery. Moreover, it should not be assumed without empirical confirmation that wide ranging discovery will facilitate settlement or is necessary to prevent costly surprise at trial.

One attempt at reducing discovery is the proposal by the Simplified Rules Committee to eliminate oral discovery in cases where the amount claimed is less than \$40,000. Costs sanctions would provide that should a plaintiff who has not used the simplified procedure collect under \$40,000, he or she shall not recover costs and will be liable to pay the defendant's costs including solicitor and client costs.²⁵² This cost sanction may seem harsh but it is probably necessary to ensure that parties do not avoid the elimination of oral discovery by simply claiming some amount over \$40,000. The elimination of oral discovery proposed by the Simplified Rules Committee may harm access to justice if the documents disclosed do not tell the whole story and are constructed (or not constructed) with a view to minimizing damaging information in potential litigation. As with so much in civil litigation, interventions in one area (oral discovery) may produce unintended and countervailing effects in another area (written discovery). A less drastic alternative that would not force parties to rely solely on disclosure of existing documents would be to allow parties the right to submit written questions to the opposing party.²⁵³

(g) CONCLUSIONS

Case management has shown promising results in Ontario. Nevertheless, it has the potential of requiring more party and court resources to be devoted to litigation by subjecting the pre-trial stage of litigation to public intervention such as case conferences and judicial management of discovery. There is a need for some type of case management but experiments should be conducted to compare the costs and effectiveness of party-based and judge-based case management. Having the parties develop their own discovery plans and conduct their own pre-trial conferences may save public resources, but probably not the resources of the parties.

²⁴⁹ Rod Macdonald in his study paper is quite sceptical about the prospects for greater precision in language precluding the need for litigation. As Lynn Smith points out, however, precise language can be used to indicate what is not covered by a legal rule. Ontario Law Reform Commission *Study Paper on Prospects for Civil Justice* (1995) at pp.51-4; pp.275-6. For a more radical proposal advocating greater simplicity in legal rules see Richard Epstein *Simple Rules for a Complex World* (Cambridge: Harvard University Press, 1995)

²⁵⁰ *Peruvian Guano* (1882) 11 Q.B.D. 55 at 63 (C.A.) which allows discovery of documents that indirectly may advance a party's case. Canadian courts have not always followed this wide definition See *Kiewit Sons Co. v. B.C. Hydro* (1982) 134 D.L.R.(3d) 154 (B.C.S.C.). Nevertheless the Ontario rules governing documentary and oral discovery remain very broad and permissive. See R. 30.01-.02, 31.06.

²⁵¹ Lord Woolf *Access to Justice Interim Report* May, 1995 ch.21.

²⁵² Proposed rule 14.1.11 *Report of the Simplified Rules Committee* December 1994.

²⁵³ R.35.

Attempts should be made to codify what is discoverable and what is protected by privilege with less reliance on expansive common law definitions of relevance. This will hopefully decrease the time and resources devoted by the parties to discovery and minimize disputes and motions over discovery. Attempts to eliminate oral discovery may harm access to justice in some cases and place excessive reliance on what the parties have chosen to reduce to writing. The submission of written questions may be a less drastic and expensive alternative to the conduct of wide-ranging oral examinations for discovery.

7. THE ROLE OF APPELLATE AND SPECIALIZED COURTS

Various proposals for appellate court reform have recently been examined²⁵⁴ so this paper will only focus on how appellate court performance may contribute to settlement rates. Written jurisprudence in Ontario has increased dramatically. For example in 1974 the Ontario Reports contained about 2,400 pages while a decade later they stabilized at about 4,100 pages. What effects does the proliferation of law have on settlement rates? Decisions going in different directions from one court might be thought to decrease settlement rates by promoting uncertainty. This might be a reason to support a smaller final court of appeal for Ontario which could have the capacity to resolve more issues through written decisions and not issue discordant decisions which create more uncertainty in the law. A ground for leave to appeal to such a court should be that a case provides an opportunity to eliminate uncertainty in the law and help resolve other cases.

Even in the absence of appellate court reform in Ontario, greater attention should be paid to available means to make strategic use of the appellate courts to settle areas of the law that are producing litigation. Rule 22 provides a mechanism for special cases to go directly to the Court of Appeal. Given that court's caseload, it is understandable that there is reluctance to use this procedure or for the government to direct references to the Court of Appeal. Nevertheless, a direct hearing by the Court of Appeal on some unsettled issues of law may help produce certainty in the law and increase settlement rates. New legislation such as the introduction of no fault elements for motor vehicle accidents would be an obvious candidate for pre-emptive references to the Court of Appeal. The absence of a case and controversy requirement in the Canadian constitution means that appellate courts can interpret statutes and the common law without the benefit of actual cases decided on adjudicative facts. Allowing appellate courts to engage in such pre-emptive interpretation of new legislation is another example of the efficiency of the public law model of adjudication as compared to the traditional model of corrective justice.

Specialization within the superior courts such as the commercial list in Toronto is another important development. Specialization may be a way of recognizing and promoting distinct legal cultures among a specialized bar and bench. Such groups could potentially develop working relationships that might allow more cases to be settled or litigated in an efficient manner.²⁵⁵ At the same time, specialization creates the risk of strategic behaviour by making the bar and bench and perhaps even the litigants "repeat players" who may be concerned about more than the most efficient outcome in the particular case. It is also possible that specialization may make the law more complex and difficult to apply. This is an issue that is

²⁵⁴ Ministry of the Attorney General *Appellate Court Reform in Ontario* (1994)

²⁵⁵ Rod Macdonald "Study Paper on Prospects for Civil Justice (1995)" at p.79.

amenable to controlled experiments with commercial cases, for example, being randomly assigned to a specialized and a generalist court.

8. CONCLUSIONS

(a) THEMES

There seems to be a willingness to have the public intervene through case management to ensure that parties prepare cases for litigation in a diligent fashion, but much less willingness to regulate or alter the practice of hourly billing which dominates the assessment of both legal fees and indemnities. In both cases, care should be taken in regulating what has traditionally been treated as a process dependent on private initiative because unsuccessful interventions will only consume more public resources where very little have been devoted in the past. If pre-trial conferences, for example, do not result in fewer and/or shorter trials, they will only impose additional costs on the parties and the public by adding yet another step to civil litigation. We should be cautious about swinging from extreme *laissez faire* in the conduct of litigation to excessive regulation and management.

Interventions such as case management may only be partial solutions to delay and costs because they do not address the incentives created by hourly billing. Legal fees should be regulated to ensure that lawyers do not engage in "overlawyering" which imposes unnecessary costs on their clients who must pay their bills, their adversaries who must respond to motions and other procedures and the public who must pay the costs of processing and hearing unnecessary procedures. Alternatives to hourly billing such as contingency fees, capped fees for specific services and budgeted litigation should be encouraged. At the same time, the legal profession will likely resist increased regulation of legal fees even though such regulation can be justified because of the monopoly that lawyers have over legal services. Hourly billing is a recent phenomena which has developed with the growth of the legal profession. It is now deeply embedded in the political economy of the profession and will be difficult to break. At a minimum, it should be made easier for clients to control and challenge the legal bills they receive from their lawyers. Legal bills should not depend solely on the hours devoted to the case.

Another strategy is to identify areas such as motions that may be a symptom of overlawyering driven by hourly billing and subject these procedures to user fees. This will help recover public resources, but not the costs of the parties. These must be addressed by making use of the disciplinary potential of existing cost rules so that a party who brings unnecessary motions and procedures has to compensate its opponent for their costs including any new user fee. Another strategy would be to encourage procedures which promise to consume less billable hours. This means abandoning the presumption that most litigation will culminate in a continuous oral trial after full discovery. The use of applications, stated questions of law, summary judgments, and summary trials should be encouraged because they will consume less party and court resources while still giving parties a day in court.

Another theme of this paper has been the need to consider the attitudes and expectations of the bar and the bench when considering procedural changes. Some recent changes in the rules of civil procedure such as the offer to settle rule have been eagerly embraced while others such as the disciplinary use of costs and the summary judgment rule have not. An appreciation of the effect of legal culture on legal rules does not mean that the bar and the bench should be given a veto on reforms which nevertheless may be in the public interest. It does, however,

mean that procedural changes introduced with consensus after wide consultation have the best potential for success. Given the entrenched interests, incremental changes may be more effective than radical changes which will be resisted. Legal culture may be amenable to more direct change through continuing legal education, communication with the affected constituencies and the pressures of competition by private providers of dispute resolution services. The symbolic effects of procedural rules should not be discounted; specific reference to the award of solicitor and client costs in response to unnecessary motions for summary judgment may have deterred the use of this procedure even though the provision itself (or even its repeal) does not determine the actual use of such disciplinary costs. Similarly, the introduction of a new summary trial rule tied to claims under \$40,000 might stigmatize the use of such a promising procedure by associating it with so-called minor claims and the appearance of second class justice.

A final and more controversial theme of this paper has been that increased aggregation of claims and the pursuit of a public law model of adjudication may not only increase access to justice but also increase judicial economy. Courts often look at innovations such as public interest standing and class actions as an additional drain on their resources when they may actually have the potential to promote overall judicial economy by preventing a multiplicity of actions. Another efficiency benefit of the public law model of adjudication is that it makes determinations of adjudicative facts less important and suggests that many cases can be litigated without full oral discovery and the calling of *viva voce* evidence. The use of applications, stated questions of law and pre-emptive references should be encouraged as they require fewer resources for both the courts and the parties. By securing authoritative interpretations of legal texts from constitutions to contracts, such procedures can resolve legal issues that may help many other parties to settle their disputes. It must, however, be acknowledged that cases with multiple claims and multiple parties may themselves be slower and more resistant to settlement than simpler claims that only affect two parties. At some point, the benefits of aggregation may be outweighed by the costs of increased complexity.

(b) FURTHER RESEARCH

The most enduring contribution of the Civil Justice Review may be to stimulate better data collection and research in civil justice issues. What follows are some areas identified in the body of this paper as meriting further research.

1. It is important to examine potential claims that are not brought into the legal system and claims commenced but not resolved by adjudication. These claims constitute the vast majority of disputes and even minor changes in disputing behaviour in these areas can have significant effects on the courts. Moreover, party satisfaction with these claims is crucial to determining whether access to justice requires easier access to the courts or whether the delay and cost associated with litigation in the courts may actually encourage effective and fair alternative dispute resolution. An important first step would be to survey those who commenced litigation but abandoned or settled it after long waits for a trial.
2. Research is needed to explain the dramatic increase in motion activity and to determine what motions are necessary to a just resolution of a case and what motions can be eliminated or subject to disciplinary cost awards or user fees.

3. Just as the medical community has become concerned with excessive medical procedures, the legal community should be concerned with "overlawyering". Overlawyering occurs whenever procedures such as motions and discovery prolong a dispute but do not contribute to its just resolution on the merits. Hourly billing, law firm incentive structures and fears about professional negligence may be contributing to overlawyering.
4. Little is known about the costs of litigation as measured by the bills that clients receive from their lawyers. Research in this area would reveal much about the behaviour of both litigants and lawyers. Clients should be interviewed to determine if they are satisfied with hourly billing or would prefer alternatives such as set fees for specific services, contingency fees or budgeted litigation.
5. The Ontario Legal Aid Plan should be encouraged to conduct controlled experiments with various forms of funding of civil cases. The costs of salaried lawyers, hourly rates, block fees for set services, budgeted litigation, contingency fees (if legalized) and tendered contracts in similar cases should be compared. These experiments should measure not only costs to the parties and the courts, but the effect of alternative funding models on the speed of dispositions and the number of motions.
6. The offer to settle rule should be studied as an important modification of the basic costs in the cause rule. It has significant settlement-inducing potential when a party is faced with a reasonable settlement offer and may counter some of the incentives created by the costs in the cause rule to proceed with some litigation. The effect of the offer to settle rule on institutional repeat player litigants especially defendants should be carefully monitored. It should also be determined whether the rule is encouraging late settlements at public expense and discouraging public interest litigation that seeks more than money.
7. The effect of statutes of limitations on disputing behaviour is not well known. Has recent liberalization of limitations through the judicial imposition of discoverability principles increased litigation and its complexity? Do short limitation periods encourage premature disputing?
8. Some data suggests that cases with multiple parties and/or multiple claims have lower settlement rates and slower dispositions than simpler disputes. More work needs to be done on the costs and benefits of increased aggregation of disputes. One method would be to concentrate on corporations faced with multiple claims with similar issues of law or fact to determine whether aggregated adjudication is more efficient than a multiplicity of individual actions. This research should be as, if not more, concerned about the effects of aggregation on settlement as on adjudication.
9. More data should be collected on the costs to the public and the parties of hearing applications as compared to actions. In particular, attention should be paid to whether resources saved by avoiding the need for *viva voce* testimony are all spent in drafting affidavits and how often procedures commenced by way of applications are converted into actions.
10. Rule 21 allows parties to secure preliminary determinations of questions of law. It is not known how often this procedure is invoked and whether it facilitates settlement or simply prolongs litigation with interlocutory issues. This procedure should be evaluated not only with respect to its role in the litigation, but also in resolving legal issues of wider import.

11. Although data suggests that case management projects in Ontario have resulted in much faster disposition of cases, the causes of this increased efficiency are not well-known. How much of this improvement is related to closer monitoring of the early stages of litigation; how much is related to the effects of schedules and trial dates and how much is related to pre-trial conferences? It is important to separate the effects of various case management interventions because their costs on the courts and parties differ greatly. More controlled experiments need to be conducted comparing the effects of specific case management interventions and the relative effectiveness of party and official based case management.
12. The utility of discovery in encouraging settlements and producing fair and efficient trials needs to be assessed through controlled experiments involving full and limited discovery. The adversarial features of discovery suggest that it may not be the optimal means of encouraging settlement. The assumption that discovery is necessary for a continuous oral trial must be assessed in light of data about how many cases subject to discovery actually culminate in trials and the benefits of discovery for the conduct of such trials. The costs and effectiveness of written questions as opposed to oral examinations for discovery should be compared.
13. The role of appellate cases in settlements needs to be explored. Has the dramatic increase in the number of reported cases in the last twenty years affected settlement rates? Can appellate decisions be crafted in a manner that provides more certainty about the law and increases settlements? How many cases could be prevented by allowing appellate courts to hear pre-emptive references concerning the interpretation of legislation?
14. It is often assumed that specialization will increase settlement rates and efficiency in litigation. These assumptions should be tested with controlled experiments with similar cases heard in specialized and generalist courts.

(c) RECOMMENDATIONS

What follows are some general recommendations discussed in the body of the paper.

1. The landscape of disputes is subject to legislative intervention as witnessed by the dramatic decline in motor vehicle claims after legislative restriction of litigation and the dramatic decline in divorce trials after legislative changes. Legislation such as reform to the human rights commission or amendments concerning motor vehicle accident litigation should be devised with attention to their likely effects on the courts. At the same time, the effects of legislation on courts is likely to be, at best, a secondary factor in decisions to change legislation.
2. Motions and pre-trial conferences consume more judicial time than trials. The Civil Justice Review should focus on streamlining the pre-trial process as it consumes the most resources and may be more amenable to change than trials. Litigants should be encouraged to use simpler written motions and user fees should be imposed on some motions such as motions for extension of time and in relation to discovery. Exceptions may be motions for interlocutory remedies to prevent irreparable harm and motions that attempt to dispose of a case such as motions for summary judgment. The former raises fairness concerns while the latter can potentially contribute to increased efficiency.

3. Alternatives to hourly billing should be encouraged. Contingency fees will not likely counter the effects of hourly billing if they are still tied closely to the hours devoted to a case. The *Solicitors Act* should be amended to make assessment of lawyers's bill more accessible and to make clear that the hours devoted to a matter should not be the dominant factor in determining remuneration. Lawyers should also be encouraged and perhaps required to devise litigation budgets and more specific retainers which better enable their clients to judge the cost of litigation. Clients should be given more information about the costs and procedures of litigation to place them in a better position to monitor and control their legal fees. If these interventions are not effective, more drastic direct regulation of legal costs should be attempted even though they will likely produce resistance and adaptive behaviour from lawyers.
4. Courts should be encouraged to make use of existing rules which allow the basic costs in the cause rule to be fine-tuned. Disciplinary use of costs to penalize unnecessary motions and procedures should be encouraged. Judges should be required to make directions as to costs at the conclusion of each motion and trial. They should be aware that automatic application of the costs in the cause rule may deter meritorious but innovative litigation. It may also encourage overinvestment in cases that a party believes it is certain to win.
5. The offer to settle rule should be modified to encourage earlier as opposed to later settlements. Judges should also depart from its terms when it discourages litigation which may benefit the public and advance non-monetary values even though it did not recover claims in excess of an offer to settle.
6. Experiments should be conducted with user fees to internalize the costs of certain types of litigation on the parties. Collection cases and pre-trial motions are the most obvious candidates for user fees. A user fee could also be charged to those who, having rejected a reasonable settlement offer and gone to trial, are subject to costs sanctions under the offer to settle rule. User fees could also be imposed on corporations who are frequent users of the court system and who do not attempt to minimize the use of litigation. User fees could be exacted by costs to the court which have to be paid by those initiating procedures such as motions or collection cases unless some good reason exists for requiring respondents to pay the costs or for waiving the costs altogether.
7. Statutes of limitations should be reformed to maximize certainty about what limitation period applies and to repeal short limitation periods which may inhibit access to justice and stimulate premature litigation. Ultimate limitation periods can be used to preclude stale claims which impose significant costs on parties and the courts.
8. The use of applications should be encouraged perhaps by imposing user fees on actions or, less dramatically, by imposing costs sanctions on actions that could have been decided by way of applications. Courts should ensure that applications can be heard by a judge in much less time than a full action and that the profession is aware of the benefits of the more summary application procedure. Applications may not only save the parties and public resources, but also encourage settlement in other cases by resolving disputes about the interpretation of legal instruments from constitutions to contracts.

9. Parties should retain the option of seeking pre-trial resolution of a stated question of law in cases in which the issue is a matter of public importance beyond the particular dispute. If the matter is only important to the present parties, then parties should combine preliminary challenges to the legal and factual sufficiency of a case.
10. Specific reference to the award of solicitor and client costs in response to an unsuccessful motion for summary judgment should be repealed. Such costs could still be awarded under disciplinary rules if necessary to curb frivolous summary judgment motions.
11. A summary trial rule patterned after the British Columbia rule should be introduced. Such a rule should be available in all cases, not only those involving claims less than \$40,000 as proposed by the Simplified Rules Committee. That Committee's proposal to eliminate oral discovery and limit cross-examination on affidavits may only provoke more resistance to the use of summary trials. As in British Columbia, courts should retain the option of adjourning a motion to allow further discovery and of allowing a deponent to be cross-examined on his or her affidavit in the presence of a judge.
12. The costs of case management, particularly the costs of pre-trial conferences and motions for extension of time, should be carefully monitored because they may only increase the costs of litigation for both the courts and the parties. All parties should be encouraged to more closely monitor the early stages of litigation and lawyers should be penalized for not promptly informing the court of the settlement or abandonment of a claim.
13. The rules of relevance, privilege and use of information obtained in discovery should be codified in an attempt to limit disputes over discovery that result in motions and to counter the expansive nature of common law definitions. The discovery of documents can be collapsed with the pleading stage in some cases. It may be appropriate in some cases to require a party to submit written questions as opposed to conducting an oral examination for discovery.
14. Appellate courts should have the resources to identify areas of the law that need to be clarified in order to increase settlement rates. They should be more pro-active in consolidating cases and issuing judgments which attempt to resolve issues that will assist others in settling their cases. Governments should use the reference procedure when it can prevent anticipated litigation over new statutes.

ALTERNATIVE DISPUTE RESOLUTION AND THE ONTARIO CIVIL JUSTICE SYSTEM

ALLAN STITT, FRANCIS HANDY AND PETER A. SIMM

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ALTERNATIVE DISPUTE RESOLUTION AND THE ONTARIO CIVIL JUSTICE SYSTEM

ALLAN STITT, FRANCIS HANDY AND PETER A. SIMM

1. INTRODUCTION

The Civil Justice Review's First Report recognized that a modern civil justice system in Ontario must make available to the public both traditional court processes and Alternative Dispute Resolution (ADR) options.¹ This paper will examine which ADR processes are appropriate for inclusion in Ontario's existing civil litigation framework, which legal proceedings are best suited for ADR, when in the litigation process ADR should be attempted, whether ADR should be mandatory or voluntary, whether court-connected ADR should be publicly funded, and whether court-connected ADR services should be provided by the public sector or the private sector.

This paper does not consider ADR in relation to specialized areas of civil disputes, since these topics are addressed in other forthcoming or recently-published studies.²

The Terms of Reference³ of the Ontario Civil Justice Review state that:

The members of the public require a more efficient, less costly, speedier and more accessible civil justice system. To achieve this objective...this review is mandated to develop an overall strategy for the civil justice system in an effort to provide a speedier, more streamlined and more efficient structure which will maximize the utilization of public resources allocated to civil justice.

...

Some issues which are to be considered in [the longer-range] aspect of the Review's mandate are the following:

...

- (d) the role of private industry in providing alternative methods for parties to resolve issues without resorting to the judicial process. This would include mediation, arbitration, and other alternative dispute resolution processes;
- (e) the role and obligations of litigants to avail themselves of the various resolution initiatives provided by the court prior to the entitlement to a trial.

¹ Ontario Civil Justice Review, *The First Report of the Civil Justice Review* (Toronto: the Review, March 1995) at 4-5. In this paper, civil proceedings refers to proceedings which are commenced in the Ontario courts in accordance with the Rules of Civil Procedure.

² See, for example, Julie MacFarlane's May 1994 study, *The Landlord/Tenant Dispute Resolution Project: Final Report and Recommendations*. The Ontario Attorney General's Advisory Task Force on Alternative Dispute Resolution of Construction Disputes issued a Discussion Paper in Nov. 1994. ADR in family-law disputes will be covered by the Family Law Group of the Civil Justice Review. ADR in the field of administrative law will be addressed in other papers being prepared for the Civil Justice Review, namely: Margot Priest, "Fundamental Reforms to Administrative Boards and Agencies"; and Martha Jackson, "The Reallocation of Disputes from Courts to Administrative Boards or Decision-Makers".

³ Reprinted in the *First Report*, *supra*, note 1 [no pagination].

With these goals in mind, we propose in this paper a system for integrating mediation into the civil litigation dispute resolution mainstream, so as to increase the flexibility of dispute resolution and give access to greater justice for a wider range of disputants.

One of the difficulties with examining ADR in a short paper is that ADR encompasses a spectrum of several different processes—from negotiation, to non-binding third-party intervention (such as mediation), to binding third-party intervention (such as arbitration). Our definitions for these terms are set out below in the section titled “The ADR Spectrum”.

In this paper, we consider use of only non-binding processes that will contribute to the goals set out above and that are outside traditional litigation rules. We have therefore not looked at the possibility of having court-annexed binding arbitration programs for Ontario. No valid empirical basis exists for allocating cases for arbitration as opposed to litigation. Further, and more importantly, the litigation system already provides a binding mechanism for settling disputes. Therefore, in our view, arbitration programs are not fundamentally different from litigation, and may require procedural, rather than substantive changes to civil rules.

We have also not reviewed more creative use of options already existing in the rules of civil procedure, such as summary judgment, agreed statements of fact, requests to admit, and so on. We do not disagree that amendments to the rules of civil procedure or more creative use of the existing rules may be methods of contributing to more efficient and effective dispute resolution as well. For this paper, however, we have focused our efforts on non-binding mediation.

In its First Report, the Civil Justice Review states:

We believe that the State has an obligation to make available to its members the means by which their disputes may be resolved, peacefully, through the medium of independent, objective and fair third party intervention.⁴

In Ontario, parties to litigation currently receive mandatory third-party intervention with their cases only at the pre-trial conference, and at trial.⁵ At pre-trials, judges, exercising their traditional function, give assessments of the likely outcome at trial, in the hope that this information will help the parties to settle.

As an American commentator, Wayne D. Brazil, has pointed out:⁶

One of organized society's most fundamental responsibilities is to provide means by which people can resolve disputes without violence. In other words, providing effective dispute-resolution processes is an essential public responsibility. It is because we recognize that fact, and because we are concerned that the formal adjudicatory process might not, in all circumstances, deliver the best dispute resolution services, that we are interested in having public courts explore the wisdom of sponsoring ADR programs.

⁴ *Supra*, note 1 at 7.

⁵ There are also a number of pilot projects across the province, examining the effectiveness of certain ADR techniques. These projects will be assessed separately. (See, for example, Julie MacFarlane's *Court-based Mediation for Civil Cases: An Evaluation of the Ontario Court (General Division) ADR Centre* (Windsor, 1995).

⁶ Wayne D. Brazil, “Institutionalizing Court ADR Programs”, pp. 52-165 in Frank E.A. Sander, ed., *Emerging ADR Issues in State and Federal Courts* (Chicago: ABA Litigation Section, 1991) at 56.

We agree with this general statement, and wish to explore the wisdom of having public courts sponsor ADR programs in Ontario. This paper will examine the feasibility of incorporating mediation (which we define in this context only as third party assistance in a non-binding process) a part of the dispute-resolution process early in a civil proceeding that has been commenced in the Ontario court system. The goal of such a step would be to save judicial and administrative resources, reduce unnecessary confrontation, increase the substantive and procedural satisfaction of the users of the civil justice system, and produce outcomes that the parties want to implement.

2. EXECUTIVE SUMMARY

We recommend that Ontario adopt a system in which litigants in civil proceedings commenced in Ontario will be required to attend a mediation—a non-binding ADR process—after the close of pleadings and before discovery, as a prerequisite to proceeding with the litigation. At the mediation, the mediator should assist the parties to attempt to negotiate a resolution to the dispute by helping them determine their interests and generate creative options independent of their strict legal rights or a perceived outcome at trial.

We recommend that the mediators be drawn from a pre-approved private sector pool of mediators. The parties should be given the opportunity to choose their mediator. The pre-approval of mediators is not examined at any length in this paper.

In order to fund the mediation, we recommend that the government agree to contribute a nominal fixed sum (e.g. \$200) toward the cost of the mediation if the parties settle the dispute at the mediation or within a short time thereafter. The parties should bear the balance of the cost of the mediation. If the parties do not settle within this time, they should bear all of the costs of the mediation themselves.

The model that we propose is similar to the model being used in Florida and Texas, where there is a requirement that parties go to private mediators before being permitted to proceed to trial. Parties in those two states are required to pay their own costs of the ADR process.⁷

3. THE ADR SPECTRUM

(a) INTRODUCTION

Dispute resolution encompasses a number of processes, ranging from negotiation, to non-binding processes (such as mediation), to consensual binding forms of ADR (such as arbitration), to litigation. These processes frequently are described as a spectrum: they are often arranged to correlate with increasing cost and third-party involvement, decreasing control of the parties over the process, and, usually, increasing likelihood of having the relationship between the disputants deteriorate during and after the resolution of the dispute.⁸ Recently, the processes other than traditional litigation—i.e. those on the less costly and more party-

⁷ Stephen B. Goldberg, Frank E.A. Sander, and Nancy Rogers, *Dispute Resolution: Negotiation, Mediation, and Other Processes* (Waltham, Mass.: Little Brown, 1992) at 291.

⁸ There are many versions of the ADR spectrum, and different names for similar ADR processes. One version of the spectrum, produced by the Law Society of Upper Canada in 1992, is reproduced in Appendix "A" to this paper.

controlled end of the spectrum—have been gathered under the term Alternative Dispute Resolution or ADR.

ADR is growing in importance as society and the legal profession grapple with the problems associated with traditional litigation. Faced with court overcrowding, rising demands on scarce public resources, escalating legal and emotional costs, and an increasingly long and arduous litigation process, disputants search for new processes that could resolve the issues in a way that makes sense for all involved. Some disputants want a binding decision imposed on them, but quickly, in private, with a minimum of monetary and emotional expense. Others want a less intimidating process where the parties have control over the decision, and can explore an increased number and range of available solutions (“expanding the pie”), rather than being confined to “win” or “lose” options. They want a process where they will have an opportunity to express their interests without fear that their legal rights will be harmed, and where their relationships will not be unnecessarily jeopardized by the very process of resolving the dispute.

In response to these needs and desires, ADR processes have developed both independently and as part of court programs. Many ADR processes can be considered as either forms of arbitration, in which a neutral provides a binding or non-binding decision about the likely outcome if the cases were to go to trial, or as forms of mediation, a non-binding process where a neutral third party assists the disputants to negotiate a resolution of the dispute. Whatever its specific features, an ADR process must be confidential to function effectively.

ADR is currently being used in Ontario in a number of areas. A summary of some of those uses is set out in Appendix “B” to this paper. Below, for the purposes of this paper only, we set out the attributes of the two primary techniques usually included in the term ADR: Arbitration and Mediation.

(b) ARBITRATION

In arbitration, as in litigation, a neutral third party (or a panel) makes a decision based on the merits of the dispute. The disputants can agree in advance to be bound by the decision of the neutral, or to treat the decision as advisory only. As in litigation, there may be witnesses who are examined and cross-examined, and ordinarily counsel make opening and closing arguments. Unlike litigation, however, there typically are no discoveries. Parties in an arbitration are able (with or without the arbitrator’s assistance) to determine time limits both prior to and at the hearing, rules of evidence, whether witnesses should be sworn, the scope of pleadings (if there are to be any), and the level to which the arbitrator should be permitted to intervene in the hearing.

Although parties may opt out of some of its provisions, all arbitrations in Ontario are governed by the *Arbitration Act, 1991*, S.O. 1991, c. 17, as amended, while international arbitrations conducted in Ontario are subject to the International Commercial Arbitration Act, R.S.O. 1990, c. I.9. These cases are not part of the civil justice system in Ontario, and in this sense are truly alternative to litigation.

The parties may jointly select a single arbitrator, or have a court appoint the single arbitrator, or the parties may each appoint an arbitrator and have their two appointees agree on a third arbitrator (who will then chair the panel). If there is a panel rather than a single arbitrator, majority and minority decisions may be rendered.

Arbitration can have a number of advantages over traditional litigation. Firstly, hearings can be arranged quickly if the parties and arbitrator(s) are available. Secondly, because the

parties set their own procedural rules, they can limit pleadings, discovery, number of witnesses, and time for examination, cross-examination, and oral argument. Therefore the parties can get a decision within months, weeks or sometimes days of the dispute arising.

With this control over the process, the parties can drastically decrease their costs and the time that they need to devote to resolving the dispute. Just as importantly, a quick resolution can avoid problems such as secondary disputes over the mitigation of damages, the loss of evidence, failure of memory of witnesses, and other complications that can arise when a trial takes place long after the events that caused the dispute. Further, the custom-tailored nature of procedural rules for the arbitration also enables the parties to agree on the admissibility of evidence, regardless of the admissibility of that evidence in court.

There is also a danger in litigation that the judge may be unfamiliar with the subject area in dispute. In arbitration, the parties can choose an arbitrator with expertise in the subject area and thereby increase the likelihood of receiving an informed decision. In her conclusions to her survey of the literature on private dispute-resolution mechanisms, Roehl states that: "Private dispute-resolution appears especially promising for complex, multi-party cases, and where narrow expertise is desirable from a neutral third party."⁹

Finally, because appeal rights are limited for arbitrations,¹⁰ the decision of the arbitrator usually ends the process and resolves the dispute.

Disadvantages to arbitration do exist, however. Like litigation, arbitration calls for a decision to be made: there is no opportunity to adopt a creative solution which "expands the pie" and creates joint gains. There is still a winner and a loser in an arbitration, and a corresponding a priori uncertainty about the result, regardless of the arbitrator's expertise. At the end of an arbitration, relationships are often destroyed. Parties also have no opportunity during an arbitration to express their interests and to explain the problem as they see it (other than as allowed by their counsel in direct examination and by opposing counsel in cross-examination).

As well, once they are in the heat of a dispute, parties are often not amenable to resolving procedural issues amicably. The arbitrator may therefore have to resolve those issues for the parties; in such situations, the process can become as protracted as litigation.

Finally, although arbitration does impose a decision on the parties, it does not necessarily provide the parties with the procedural safeguards that have evolved in courts through the common and statute law. An inadequate or improperly conducted arbitration may lead therefore to subsequent litigation in the form of an appeal or judicial review, in a situation where substantive rights may already have been impaired.

⁹ Janice A. Roehl, "Private Dispute Resolution" (paper for National Symposium on Court-Connected Dispute Resolution Research, Orlando, Fla., Oct. 1993), pp. 131-154 in Susan Keilitz, ed., *National Symposium on Court-Connected Dispute Resolution Research: A Report on Current Research Findings—Implications for Courts and Future Research Needs*, (National Center for State Courts, 1994) [hereinafter Keilitz, *National Symposium*] at 150.

¹⁰ Also see the section of this paper entitled, "Court Review of Mediated Agreements", *infra*.

(c) MEDIATION

Mediation is a process in which a neutral third party facilitates negotiations between disputing parties. The mediator has no power to impose a resolution: a resolution is achieved only if the parties agree to it. Generally, there are two forms of mediation: rights-based and interest-based.

In a rights-based mediation, a neutral third-party gives the parties his or her independent assessment of the merits of the case and the likely outcome. Rights-based mediation is therefore not readily distinguishable from non-binding arbitration. The parties are free to accept the assessment of the mediator, modify it, or reject it outright. A familiar example of rights-based mediation is the pre-trial conference. If given a choice, people with little or no experience with mediation may opt for rights-based mediation as the preferred form of dispute resolution. They may feel comfortable with a neutral third party opining on the merits of the dispute, and consequently may have difficulty seeing the utility of a neutral third party who does not provide an opinion on substance.

The other form of mediation—the form used at the Toronto ADR Pilot Project and the method that we advocate in this paper—is interest-based mediation. Interest-based mediation seeks to have the parties focus on their underlying interests rather than on the potential outcomes of litigation. The theories are often attributed to Roger Fisher, William Ury, Bruce Patton¹¹ and Frank Sander of Harvard Law School.

An interest-based mediator attempts to determine why the parties take the positions they do on the issues, and encourages the parties to generate creative options to satisfy their interests. The mediator then focuses on objective criteria (often generated by the parties) to help the parties choose from among the options. The parties can then compare the creative options to their Best Alternative To a Negotiated Agreement (or BATNA).¹² The mediator facilitates the process of the mediation and leaves the substantive issues to the parties and their counsel.

The advantages of interest-based mediation are numerous. Firstly, the parties have an opportunity to express their feelings, needs and interests in a way that does not exist at discovery, trial, or in a rights-based ADR process. Disputants sometimes find that after the cathartic experience of expressing interests, they are able to address the legal or monetary issues more easily.

Secondly, the parties have the opportunity to play a substantive role in shaping the solution ultimately achieved. The parties can look at all possible options, not only ones that a court or arbitrator could impose. Parties may come up with face-saving resolutions to the dispute that both sides can live with comfortably. They may also be able to combine a number of outstanding issues (whether or not part of a litigation proceeding) to create an elegant solution to outstanding problems, in a way that benefits all involved.

Thirdly, because the parties have control of the resolution that is achieved and must agree to it, the parties have a stake in abiding by the agreement to ensure that it works. Solutions achieved in mediations are therefore more likely to be honoured by the parties.

¹¹ Roger Fisher, William Ury, and Bruce Patton, *Getting To Yes, Negotiating Agreement Without Giving In* (2nd ed.), (New York: Penguin Books, 1991).

¹² For detailed discussion of the significance of BATNA, see *ibid.*

Next, mediation can be accomplished quickly. Mediations in civil cases rarely last longer than one day, and often can be completed in less than half a day. There is usually no need for production of documents, discovery, or any other court process prior to mediation. The resulting cost savings for the parties—in terms of legal fees and the saved opportunity cost as a result of the streamlined process—can therefore be very large if the mediation is successful.

Also, the mediation can be conducted in a non-adversarial and informal environment, in which the mediator attempts to make the parties feel comfortable with the process, so that the parties can concentrate their efforts on resolving outstanding issues.

Further, interest-based mediation, in stark contrast to litigation and arbitration, strives to improve or at least not to damage the relationship between the parties after the dispute is resolved. The trained interest-based mediator controls the process so that the parties can focus their energy on dealing with the issues, rather than on attacking each other. If the dispute can be resolved without harming the relationship, there may be an opportunity for parties to maintain their ability to deal with each other in the future, which may be important in many contexts, including, for example family, commercial or employment matters.

In addition, parties are generally satisfied with the results from interest-based mediation. A review of the empirical literature shows that “Both litigants and attorneys find mediation to be fair and satisfactory”.¹³

Finally, and perhaps most importantly, since mediation is a non-binding process, parties maintain their legal rights. If they are not satisfied with the resolution that they can achieve at the mediation, parties are free to continue along the litigation path. The mediation is conducted without prejudice.

4. THE PLACE OF MEDIATION IN THE CIVIL JUSTICE REGIME

Mediation, when defined as a non-binding facilitation by a neutral third party of negotiations between disputants, offers significant advantages over traditional litigation as a means of resolving disputes to the satisfaction of the parties involved.

When compared directly as an alternative to the litigation process, including a trial, a successful mediation process is less costly to the parties, quicker, potentially more satisfying in terms of resolving the root causes of the dispute, more in the control of the parties, more private, and would require less public expenditure of resources. Given an informed choice between mediation or litigation as the first process to attempt to resolve a dispute, therefore, it is difficult to see why a disputant would choose litigation.

However, in the context of the Civil Justice Review Project, mediation (or other ADR processes) is not truly and should not be presented as an alternative to litigation, although it is popularly thought to be. Mediation should be considered as an appropriate form of resolution for certain disputes.

Approaching the issues from this perspective, in certain cases where mediation is unsuccessful and litigation ensues, there could be additional costs to parties and the public. Some commentators have argued that this danger would result in mandatory ADR and mediation merely creating an additional layer of cost and procedure, without additional

¹³ Susan Keilitz, Roger A. Hanson, and Steven H. Clarke, “Civil Dispute Resolution Processes”, (paper for National Symposium on Court-Connected Dispute Resolution Research, Orlando, Fla., Oct. 1993), pp. 1-33 in Keilitz, *National Symposium*, *supra*, note 9 at 9.

settlement incentive.¹⁴ However, in cases where mediation is successful, and the parties settle their litigation promptly before discovery, then the transaction, administration, private and public cost savings will be significant.

Defining a mediation as successful and determining if a mediation avoids costs are problems that vary from case to case. In some cases, mediation may serve to eliminate or narrow issues, may reduce the scope of or need for discovery, may lead to more realistic assessments of the value of the claim, or generate ideas which the parties may act upon at a later time. All of these results may mean that the mediation was partially successful, or may have saved some costs when compared to litigation (including a trial), or to the costs of litigation until settlement is made on the eve of or during adjudication by the courts.

Unfortunately, there is not enough experience or empirical evidence in Ontario to determine whether public investment in mediation as part of the civil justice system is warranted as an overall saving of public money. In addition, it is not clear that measures such as public satisfaction or confidence in the civil justice system are readily quantifiable in relation to expenditures. There are, of course, serious technical barriers to direct empirical research in this area, including problems in comparing data across jurisdictions with differing procedural rules and attitudes to litigation, the dominance of subjective personal characteristics as a determinant in litigation decisions, the lack of informed consumers of legal services in the ADR forum, and the lack of informed providers of legal services in the ADR forum. Any of these factors may severely limit attempts to measure and quantify the true impact and benefit of mediation expenditures.

In addition, the empirical data which does exist is generally from the United States, which has significantly different procedural rules, cost rules and social structure affecting the quantum of damages. For instance, because the U.S. provides a constitutional right (as set out in the Seventh Amendment) to a jury trial for "suits at common law, where the value in controversy shall exceed twenty dollars", there is some reluctance to limit trials as a manner of resolving civil disputes.

In light of these difficulties, the most to be said is that the literature is mixed on the efficacy of ADR in general and mediation in particular in the context of public cost savings. Some studies indicate significant advantages in particular proceedings, but note the lack of reliable long term overall data regarding factors including case processing time, trial rates, settlement rates and litigant costs.¹⁵ It is simply not possible to answer these questions definitively at this time.

¹⁴ See for example, Steven Shavell, "Alternative Dispute Resolution: An Economic Analysis", (1995) *University of Chicago, Journal of Legal Studies*, Vol. XXIV, 1-28. The Shavell analysis, for instance, is result oriented, and deals with ADR settlement OR trial adjudication. Studies are yet available to demonstrate the impact of shifting settlement time forward in the trial process. The logic of "ADR or trial" is not always an analysis that parties can make at the commencement of a proceeding and leave unchanged throughout the process of their dispute. Shavell does not deal with transformational aspects of disputes or the process of conflict resolution, nor does his analysis review the relationship value of ADR. As his study notes further investigation is warranted.

¹⁵ See Keilitz, National Symposium, *supra*, note 9; Wayne Kobbervig, *Mediation of Civil Cases in Hennepin County [Minnesota]: An Evaluation* (Minneapolis, Minn.: Judicial Center, 1991); Craig McEwen, *An Evaluation of the ADR Pilot Project [in Maine]: Final Report* (Brunswick, Me.: Bowdoin College, 1992); Karl Schultz, *Florida's Alternative Dispute Resolution Demonstration Project: An Empirical Assessment* (Miami, Fla.: Florida Dispute Resolution Center, 1990); Michael Fix and Philip J. Harter, *Hard Cases, Vulnerable People: An Analysis of*

The term "settlement rate" itself is problematic. A settlement at the courthouse steps on the eve of trial is settlement, but may not be as "good" a settlement if the same or a "better" result could have been achieved prior to parties incurring the enormous investment attendant on the litigation process, particularly (in Ontario) discovery. If mediation can achieve the result of shifting even some settlements to an earlier stage of the litigation process, the result should be a reduction in the administrative burden on the courts in matters such as filing of materials, dealing with motions, scheduling trials, allocating trial time, having trial time suddenly abandoned, and so forth.

If the number of disputes which enter the litigation stream continues to increase, savings in the sense of reductions of costs may occur, and greater burdens may be alleviated. Resources should logically be expended at the earliest and least costly stage administratively, where the goal and opportunity is to remove cases completely from the system through a party-generated and approved settlement, rather than having cases linger, with costs rising, until a trial is imminent. On the other hand, the process should not be commenced so early in the dispute that the possibility of settlement is slim.

The quality of a settlement in our view is a significant, but again not easily measurable, determinant of whether the civil justice system is operating well. Parties who are compelled to settle because of the prospect of unreasonable cost and delay due to systemic failure, differences in relative resources, or other reasons unrelated to the merits of their disputes, do not obtain results intended by the civil justice system or supported as a matter of policy by the state. A central goal of the civil justice system should be to assist parties to reach a satisfactory and just resolution to their disputes. The addition of mediation to the public dispute resolution process is a method to help achieve this goal, and can arguably be said to offer the prospect of a positive impact without additional significant expenditure.

(a) CONCLUSION

In light of its significant advantages of mediation as an adjunct and first option prior to using traditional binding forms of dispute resolution, we recommend that interest-based mediation be added to the civil justice system in Ontario to assist parties to resolve disputes. The balance of this paper will discuss various issues arising out of, and rationale for implementing, a mediation program as part of the civil justice regime in Ontario.

5. WHICH CASES SHOULD BE MEDIATED?

(a) INTRODUCTION

One of the recommendations of the Civil Justice Review's First Report is "that the concept of court-connected ADR be accepted in principle, with the determination of the appropriate form of service model...to await the evaluation of the ADR Centre pilot project..."¹⁶ Another recommendation is "that early screening and evaluation mechanisms be built into the caseload

Mediation Programs at the Multi-Door Courthouse of the Superior Court of the District of Columbia (Washington, D.C.: The Urban Institute, 1992).

¹⁶ *Supra*, note 1 at 223, being Rec. 4 in c. 13.5. The evaluation of the Pilot Project is scheduled for completion on Nov. 30, 1995.

management structure to be implemented in the province.”¹⁷ Notwithstanding these recommendations however, there remain serious concerns and issues with the amount and quality of data available. Many decisions regarding these issues are therefore tentative, or based on logic and preliminary rather than conclusive evidence.

(b) DIFFICULTIES WITH SCREENING PROCEDURES

Some suggest that screening is not a worthwhile exercise, there being no empirical basis for the process. A New South Wales Law Reform Commission report noted in 1991 that, “As yet, there is no validated mechanism for matching disputes with [ADR] processes. . . .”¹⁸ In part of their review of court-connected ADR programs in the United States, Plapinger & Shaw state:¹⁹

This section sets forth the main criteria used by courts currently to select cases for arbitration, mediation, early neutral evaluation, and summary jury trials. It is important to underscore here again the lack of empirical data validating these judicial matching approaches and to note that some commentators question the feasibility of any systemic matching method. Others would focus less on the characteristics of the cases themselves than on the obstacles to settlement.

Based on their review of the empirical literature, Keilitz, Hanson & Clarke observe that “[t]here is little evidence that any particular types of cases are more likely to benefit from [non-binding ADR] than are others.”²⁰ Rosenberg & Folberg reach a similar conclusion, having found few statistically significant outcome differences among the various nature-of-suit categories.²¹

In his search for ways to increase efficiency and reduce delay in the resolution of lawsuits filed with the Ontario Court (General Division), Macdonald concludes that there is no way to examine the nature and characteristics of disputes so as to intelligibly determine what would be the appropriate dispute resolution mechanism.²²

¹⁷ *Ibid.* at 223, Rec. 5.

¹⁸ New South Wales Law Reform Commission, “Court and Tribunal Connected Dispute Resolution”, c. 6 in ———, *Alternative Dispute Resolution: Training and Accreditation of Mediators* (Report LRC 67), (Sydney: the Commission, 1991) at 75. Brazil, *supra*, note 6 has similarly noted [at 64] that “[T]here remains so much to be learned and such a great need for careful empirical testing of a wide range of programs and procedures.”

¹⁹ Elizabeth Plapinger and Margaret Shaw, *Court ADR: Elements of Program Design* (New York: Center for Public Resources, 1992) at 27; see also at 35.

²⁰ *Supra*, note 13 at 16.

²¹ Joshua D. Rosenberg and H. Jay Folberg, “Alternative Dispute Resolution: An Empirical Analysis [of Early Neutral Evaluation in the Northern District of California]” (1994), 46 *Stanford L. Rev.* 1487-1551. The authors state [at 1515] that they “found no significant relationship between satisfaction and type of suit [*i.e.* area of law], number of parties, age or experience of the parties or of their attorneys, or the amount of damages sought in the complaint.”

²² Roderick A. Macdonald, “A Brief Summary of Methodological Problems in Evaluating Different Schemes for Allocating Civil Disputes”, App. IV in ———, *Economical, Expeditious and Accessible Civil Justice Through a Better Allocation of Civil Disputes: A Framework for Inquiry* (Toronto: Civil Justice Review, Jan. 1995) at xi, xiii.

(c) SCREENING PROPOSALS

Despite the difficulties set out above, some authors have proposed generalized rules for the application of certain ADR procedures to certain cases, or proposed cases which should not use ADR procedures. For example, Early Neutral Evaluation—a rights-based ADR process where the parties are provided (at an early stage in the litigation process) with an opinion from a neutral third party about the potential outcome of trial—may be more appropriate where:

(1) the sides have very different assessments of the case based on different interpretations of the law or on different conclusions from agreed-upon facts; (2) the case involves complex legal questions, requiring considerable subject-matter expertise to help clarify the issues for trial, or complex facts, requiring substantial organization and development of discovery plans even after the case management conference; or (3) the litigants could benefit from the informal discovery provided by the parties' presentations and the evaluators' enquiries.²³

Mediation has been regarded by some commentators as less appropriate in particular cases. For example, in cases of medical malpractice and product liability, settlement rates appear to be lower than they are for other cases.²⁴ Others disagree, arguing that professional discipline cases²⁵ and product liability cases²⁶ are appropriate for mediation.

One type of dispute where mediation would appear to be inappropriate is a case where a party perceives that it is important to set a precedent for future use by one or both of the parties. In such cases, at least one party has little interest in settling the dispute, and a non-binding process has little likelihood of ending the litigation. Cases in which parties want to set precedents should be distinguished, however, from cases where parties believe that the dispute is a matter of "principle". In the latter situation, interest-based mediation can yield satisfactory resolutions.

Mandatory ADR has also been argued by some to be inappropriate in cases potentially setting precedents for issues of public importance.²⁷ An example could be *Lac v. Corona*.²⁸ Had this case not gone to trial (and been appealed), important legal rules concerning fiduciary duties would not have been expressed by Canada's highest court. As Wayne Brazil has cautioned: "As a matter of public policy, parties should not be deterred from legitimate use of

²³ Rosenberg & Folberg, *supra*, note 20 at 1515.

²⁴ Keilitz, Hanson & Clarke, *supra* note 13, at 10-11.

²⁵ Lisa Feld and Peter A. Simm, *Complaint-Mediation in Ontario's Self-Governing Professions* (Waterloo, Ont.: Fund for Dispute Resolution, 1995).

²⁶ NSW LRC, *supra*, note 17 at 75.

²⁷ A forthcoming paper for the Civil Justice Review by Lorraine E. Weinrib on "The Role of the Courts" will consider, *inter alia*, "what deliberations on civil disputes *must* be in the courts" and also explore the classification of disputes "as appropriate or inappropriate for court determination and/or supervision". Also see Owen M. Fiss, "Against Settlement" (1984), 93 Yale L.J. 1073-1090.

²⁸ *Int'l. Corona Resources Ltd. v. Lac Minerals Ltd.* (1986), 25 D.L.R. (4th) 504 (Ont. H.C.J.); *aff'd* (1987), 44 D.L.R. (4th) 592 (Ont. C.A.); *rev'd in part* (1990), 61 D.L.R. (4th) 14 (S.C.C.).

the judicial system and the court's function should not be displaced when issues of law are raised or when it is desirable to establish a precedent or enunciate standards."²⁹

Although we agree that legal rules set through certain cases may be important, there should not in our view be a general rule excluding potentially precedent-setting cases from the ADR stream.³⁰ Presumably, if settlement is not appropriate to the parties in a particular case, the parties will not settle; instead, after having spent a short amount of time exploring other options, they will continue on the litigation path. Requiring parties to attend a mediation should therefore not inhibit the evolution of the common law any more than does the requirement to have a pre-trial.

Parties can settle and are not compelled to continue to trial because their case has precedent setting aspects. A rule excluding potentially precedent-setting cases from ADR logically would require such cases to proceed through trial to judgment, since settlement would not be "appropriate" at any stage of the proceeding. If society or the state wishes to force parties seeking settlement to go to trial because society has an interest in the precedent that might be established by the judgment, then society or the state—not the litigants—should logically bear the costs associated with such a case.

Further, evidence does not exist to show that cases involving important legal issues are—in the absence of court-connected ADR—any more likely to go to trial than are other cases. As stated by Carthy J.A., writing for the Ontario Court of Appeal in *Armak Chemicals* (1991):³¹

"[I]n such a complex and intricate field of law, no litigant should be discouraged from putting forth a novel proposition. At the same time, every litigant should be encouraged to be single-minded in attention to the need to make and consider reasonable offers which may dispose of the litigation." Just as there is no validated empirical basis for identifying cases as suitable or unsuitable for ADR, there is no sound basis to screen out potentially precedent-setting cases from the ADR stream.

Another criticism of ADR is that private resolution of disputes in potentially precedent setting cases not only avoids the precedent, but also the chance for public scrutiny of the dispute. For instance, five thousand mediated settlements of product liability cases may be less expensive for the manufacturer than a general recall of a defective product, but the public demand for a more public solution (ie. legislation or regulation) may not be created if the public is not aware of the problem. In our opinion, however, such public accountability concerns would be better resolved through a regulatory structure than through attempting to review settlements (or failed settlements). In these situations one must balance the tension between public allocation of resources on a universal basis, with its potential cost, and the more immediate but perhaps less comprehensive partial resolution in an individual case.

Even if there were cases where society's interest in a judicial determination outweighed that of the disputants in settlement, the case would not necessarily have to be removed entirely

²⁹ *Supra*, note 6 at 75.

³⁰ A further question is whether there would be some method, other than monitoring lawyers' media statements, to determine that a case could be precedent-setting. Identifying "potentially precedent-setting cases" would obviously be a matter of great contention.

³¹ *Armak Chemicals Ltd. v. C.N.R.* (1991), 5 O.R. (3d) 1 (C.A.) at 9.

from the ADR stream. Such cases could benefit from mediation or other ADR procedures to for instance, narrow the legal questions to be determined.³²

Another screening process that some suggest is to avoid ADR in cases where there are power imbalances between parties. Although it would appear that a power imbalance would render mediation inappropriate—as the weaker party in ADR does not have the procedural safeguards that the court can offer—the mere presence of a power imbalance between disputants does not mean that a dispute is unsuitable for mediation.³³ In fact, a weaker party may be better protected by a skilled mediator than by a judicial system where the stronger party can force the weaker party to incur costs so high as to make litigation impossible and force a settlement on poor terms. A good mediator can keep costs under control, can time the process so that issues are resolved quickly (if they can be resolved), and can ensure fair exchanges of interests which avoid abuses of power by the stronger party.

There may, however, be some cases that are inherently unsuitable for mediation, because the degree of power imbalance is such that those safeguards and techniques are unable to stop the imbalance from continuing to be “intolerable”. Clarke & Davies offer the following list of situations where mediation should not be attempted, or should be terminated if already in progress:³⁴

1. Where a party is unwilling to honour mediation’s basic guidelines (for example, continuous attempts to intimidate the other party during the mediation process).
2. Where one of the disputants is so seriously deficient in information that any ensuing agreement would not be based on informed consent.
3. Where domestic violence or fear of violence is suspected, or where a party indicates agreement, not out of free will, but out of fear of the other party.
4. Cases involving child abuse or sexual abuse.
5. Where there is a “serious personal pathology”.
6. Where the parties are hoping to gain some tactical or strategic advantage which is not related to the subject-matter of the dispute (for example, as a “fishing expedition” to gain information, or as an attempt to delay proceedings).
7. Where the parties are so bitter and conflict-ridden that they are unable to separate their own emotions and feelings from the actual dispute—that is, the “all or nothing” dispute. Perhaps if counselling or therapy occurred as a preliminary measure the parties may then be suitable for mediation, but not otherwise.
8. If the parties reach an agreement which the mediator believes is:
 - (a) illegal (for example, a resolution which involves tax evasion or a breach of health and safety issues);
 - (b) a “sweetheart deal” in which an unsuspecting third party or the community in general is disadvantaged;
 - (c) grossly inequitable to one of the parties; or

³² Rosenberg & Folberg, *supra* note 20 at 1540.

³³ Gay R. Clarke and Ilya T. Davies, “A Mediation—When Is It Not an Appropriate Dispute Resolution Process?” (1992), 3 Aust. Disp. Res. J. 70-81 at 73-76.

³⁴ *Ibid.* at 79-80.

(d) the result of bad-faith bargaining.

Should a comprehensive case-management process be implemented in Ontario, the case-management judge may be able to determine whether there are power imbalances so severe that mediation should not be undertaken in a particular case. In our view, however, a judge should err on the side of having the parties attend the mediation. A mediator should be just as (if not more) able to identify severe power imbalances and stop the mediation process if necessary.

(d) CONCLUSION

There are no clear or effective rules for determining which cases are appropriate for mediation. With all of the benefits of ADR generally and mediation in particular,³⁵ however, it is important not to dismiss the usefulness of ADR merely because of screening difficulties.

We conclude, therefore, that there should be no mass system of screening for cases suitable for mediation. Instead, there should be a presumption that cases commenced in Ontario are appropriate for mediation. All civil cases in Ontario should be required to go through some form of mediation. If the mediation takes place at an early enough stage of proceedings, the mediator can consider whether there are compelling reasons why mediation should not continue. This general requirement should save both the parties and Ontario's civil justice system the time, expense and energy associated with some of the unnecessary civil litigation.

6. WHEN SHOULD MEDIATION OCCUR?

To determine when in the litigation process to institute ADR, one must consider a number of factors. Firstly, in the current civil justice system most cases settle before trial.³⁶ To provide a benefit, ADR must help parties to settle their dispute earlier than they would have otherwise. Accordingly, mediation should be implemented as soon as is reasonably possible. As Mr. Justice Adams notes, "many of the settlements that do occur come too late in the litigation process to avoid substantial monetary and personal costs".³⁷ The Civil Justice Review's First Report states that: "It is frequently observed that cases are resolved when the lawyers and the parties are required to deal with them."³⁸ Further, if mandatory mediation is scheduled to occur too late in the process, there is a danger that the program "could encourage passivity":

³⁵ See *supra*, in the section titled "The ADR Spectrum".

³⁶ "[T]he experience in Anglo-Canadian-American court systems wherever located and regardless of the structure that is in place to process the flow of cases through the system" is that "95% to 97% of all civil cases are never tried": *First Report, supra*, note 1 at 171, citing Court Reform Task Force, *The Bottom Lines* (Toronto: Min. of the Attorney General, June 1990).

³⁷ Hon. Mr. Justice George W. Adams, "Mediation and the Courts—Role of Negotiated Settlements" (1994) at 1, (paper prepared for CBA-O conference "Mechanics of Mediation", Toronto, May 26, 1994), in *Mechanics of Mediation* (Toronto: CBA-O, Continuing Legal Education Dept., 1994).

³⁸ *Supra*, note 1 at 158.

the parties and their lawyers could “retreat into the reactive mode” and “wait for the ADR process instead of initiating dispute resolution at the earliest possible juncture”.³⁹

On the other hand, using ADR might be needlessly expensive in circumstances where the parties likely would settle the lawsuit without the services of a neutral third party.⁴⁰ As Figures 1 and 2 below show, 50.6% of “standard track” and 76.6% of “fast track” cases in the Toronto Case-Management System settle before a statement of defence is served. Another significant consideration is that ADR should not be commenced until the parties have had sufficient opportunity to assess the merits of their case and their opponents’ case. Also, there must be sufficient time for parties with

³⁹ Brazil, *supra*, note 6 in App. “A” thereto (“An Outline of Some Major Questions About Institutionalizing ADR in Courts”) at 96.

⁴⁰ R.J. MacCoun, E.A. Lind and T.R. Tyler, *Alternative Dispute Resolution in Trial and Appellate Courts* (Santa Monica, CA: RAND, 1992) at 98.

FIGURE 1: Cases in the “Standard Track” of the Toronto Case-
Management System of the Ontario Court (General Division):
Dispositions by Stage of Litigation
(2,914 cases resolved Dec. 1/91 to Sept. 30/94)

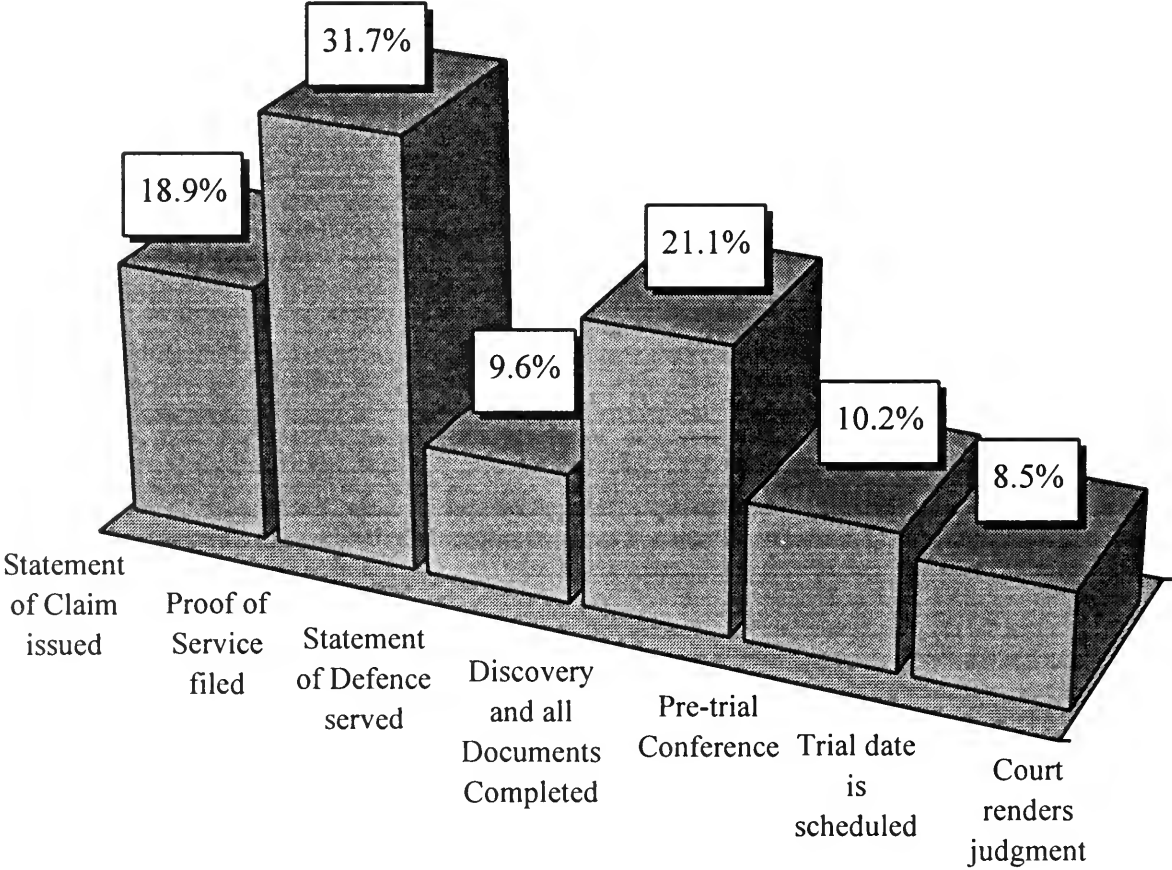
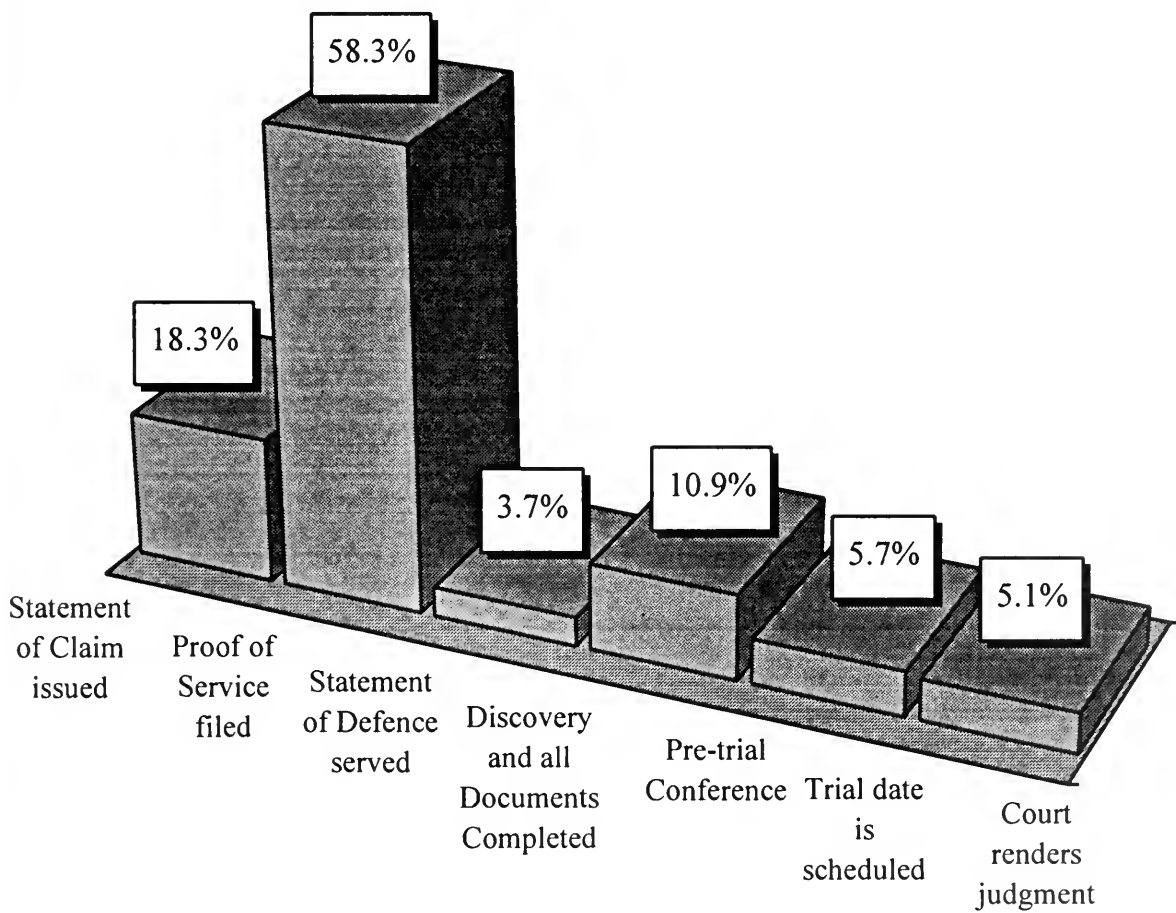


FIGURE 2: Cases in the "Fast Track" of the Toronto Case-
Management System of the Ontario Court (General Division):
Dispositions by Stage of Litigation
(3,472 cases resolved Dec. 1/91 to Sept. 30/94)



strongly emotional positions to be able to reasonably participate, but not so much time that positions have hardened so as to make settlement difficult.

As was recently noted by Feld & Simm :⁴¹

While the appropriate timing of a referral to mediation may vary—depending upon the type of case involved and the needs of the particular parties—referral generally should be made at the earliest possible time that the parties are able to make an informed choice about their participation. Early attempts and referrals are desirable before the parties' positions become hardened and substantial costs and time have been expended. The principle of early intervention does not, however, apply to all cases. There can be a risk of intervening too early—in some cases involving deep emotions such as grief, the passage of time can do wonders. In other cases, referral should be delayed to allow sufficient information to be gathered to ensure meaningful negotiations. Generally, a determination as to timing should take into account both the parties' capacity to mediate and the ripeness of the issues for mediation. There should be a system to assess readiness for mediation, on a continuous basis.

There are a number of “windows” in the litigation process during which mediation may be appropriate. The obvious possibilities are to have mediation just after pleadings are closed, after documents have been exchanged but before discovery, just after discovery, or on the eve of trial.⁴² The ADR pilot project in Toronto sends cases to mediation after the first statement of defence is filed.⁴³ The assessment of this project, when it is available, will help to establish proper timing for mediation.⁴⁴

Clearly, one must balance a number of factors to find the appropriate time for court-mandated ADR. Our preliminary conclusion, based on our analysis and experience, is that the best time to schedule a case for mediation is after the close of pleadings, but before discovery. The earlier in the dispute that resolution can be achieved, the greater the potential savings for the parties and for the public. Also, assuming that the resolution will be “better”, then the maximum benefit will also accrue to the parties in non-monetary terms.

In addition, a very significant cost of litigation in Ontario is the discovery process. A mediation can, without the formal and expensive requirements of the litigation process, provide a pre-discovery for the principal parties to the dispute of the key elements of the case, but in a forum conducive to settlement. There can therefore be an important exchange of information by the parties, and an early reality check for their counsel.

⁴¹ *Supra*, note 24 at 117.

⁴² Allan J. Stitt, “Mediation in Commercial Disputes” (1994), 2 *Roland on Corporate Litigation* 67 at 69.

⁴³ “Practice Direction Concerning Alternative Dispute Resolution Pilot Project in the Ontario Court (General Division)” (Feb. 22, 1994; effective April 18, 1994), 16 O.R. (3d) 481-491 at 484 [English language version], s. 2.1.

⁴⁴ Julie MacFarlane and STITT FELD HANDY HOUSTON, *Assessment of the Toronto Region ADR Pilot Project* (Toronto: Ministry of the Attorney General, forthcoming [Nov. 30, 1995]).

7. SHOULD MEDIATION BE MANDATORY FOR CIVIL PROCEEDINGS?

(a) INTRODUCTION

If mediation is presumed to be an appropriate process for civil proceedings generally, should parties be required to attempt to resolve their disputes through mediation before proceeding to trial? We are not referring to “binding” ADR (such as arbitration) where a neutral third-party imposes a decision, but rather a mandatory requirement to attend a mediation, where the parties would be required to attempt to negotiate a resolution to their dispute with the assistance of a neutral third party who is an expert in mediation. Parties would not be required to accept the mediated settlement, nor would they be bound by any proposed terms.

The Terms of Reference of the Civil Justice Review mandate inquiry into “the role and obligations of litigants to avail themselves of the various resolution initiatives provided by the court prior to the entitlement to a trial”.⁴⁵ In the context of examining the summary procedures in the Rules of Civil Procedure, the Ontario Court of Appeal has stated:

A litigant’s “day in court”, in the sense of a trial, may have traditionally been regarded as the essence of procedural justice and its deprivation the mark of procedural injustice. There can, however, be proceedings in which, because they do not involve any genuine issue which requires a trial, the holding of a trial is unnecessary and, accordingly, represents a failure of procedural justice. In such proceedings the successful party has been both unnecessarily delayed in the obtaining of substantive justice and been obliged to incur additional expense.⁴⁶

Since there is no absolute right in Ontario to a civil trial, the Ontario Rules provide for such other processes resulting in an adjudication, such as summary judgment. Mediation is therefore consistent with already established rules for disputes that may be resolved by another process.

Section 1 of Australia’s proposed model legislation for court-annexed mediation would empower the court to “refer the whole or any part of a civil proceeding for mediation by an approved mediator”—with or without the consent of parties”.⁴⁷ After noting that courts already have such powers in the Australian states of Victoria, South Australia, and Western Australia, the Commentary to section 1 explains:⁴⁸

The proposal allows a judge to refer matters to mediation with or without the consent of the parties. The traditional model for mediation requires and promotes mediation as a voluntary process. Experience in jurisdictions where mediation includes compulsory mediation suggests that satisfactory and lasting outcomes have been achieved by mediators notwithstanding that the parties have been

⁴⁵ *Supra*, note 3.

⁴⁶ *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.) at 550-51.

⁴⁷ “Model Legislation”, pp. 1-7 in “Proposed Model Rules for Court-Annexed Mediation” (Amendment No. 4, dated Feb. 11, 1994), reprinted as an unnumbered appendix in Jennifer A. David and Helen Gamble, eds., *A National Best Practice Workshop on Court-Connected Mediation* (held at Sydney, Aug. 6-7, 1994), (Sydney, Aust.: Centre for Dispute Resolution, Faculty of Law & Legal Practice, U. of Technology; Centre for Court Policy and Administration, Faculty of Law, U. of Wollongong, 1994).

⁴⁸ *Ibid.* at 2.

directed to mediation. See Giles J. in *Hooper Bailey Associated Ltd. v. Natcon Group Ltd.* (1992), 28 N.S.W.L.R. 194 at 206. What is enforced is not settlement but participation in a process from which a settlement might come.

(b) THE EMPIRICAL LITERATURE

In her recent survey of the American literature on court-connected ADR, Gray concludes that there is not yet a sufficient empirical basis to guide those pondering whether such programs should be voluntary or presumptively mandatory:⁴⁹

There is little empirical information to guide courts on the differences between voluntary or mandatory dispute resolution programs in their impact on the court and on litigants. Voluntary dispute resolution processes have substantially lower volumes than do mandatory processes, but voluntary participation appears to have positive effects on compliance and may result in greater satisfaction and higher settlement rates than mandatory dispute resolution. However, research has not specifically addressed this issue. If, in fact, satisfaction and settlement rates are lower in mandated dispute resolution processes, are the rates sufficient for the courts to continue to use mandatory programs? Do mandatory programs appear to have a greater impact on court caseloads than do voluntary programs, which may rely upon self-referral or more labor intensive individualized screening? How does satisfaction with mandatory dispute resolution compare to satisfaction with traditional adjudication? Do court orders mandating participation in dispute resolution bring attorneys to the table who otherwise would not propose use of a dispute resolution process to avoid showing in weakness in their client's case? Do mandatory programs expose attorneys and litigants to processes which they may then choose to use voluntarily in another case, thereby providing an educational benefit? A related policy issue that research might enlighten is whether courts should mandate the use of programs or procedures that may cost litigants time and money.

(c) VOLUNTARY ADR

Commentators warn that if an ADR system is not mandatory for the parties, it may suffer from underutilization. Keilitz states:

Virtually all of the research on court-annexed arbitration has been conducted in jurisdictions where arbitration is mandatory [but with a right to trial *de novo*]. Most programs allow voluntary stipulations to use arbitration in cases that fall outside the program's eligibility rules. Because court-annexed arbitration is highly rule-bound and requires considerable effort to implement, voluntary programs, which have been under-used, probably would not warrant the expenditure of time and resources.⁵⁰

For four years, Rosenberg & Folberg studied in the Northern District of California an ADR program to which cases had been randomly assigned to ADR (with provision for opting-out upon a petition to the court showing good cause). Their observations on provisions for opting-in, or for opting-out with cause, were as follows:

Interestingly, fewer than 10 percent of the parties in [presumptively mandatory, non-binding ADR] actually took advantage of the opt-out provision....Meanwhile, parties whose cases were not

⁴⁹ Ericka B. Gray, "Multi-Door Courthouses" (paper for National Symposium on Court-Connected Dispute Resolution Research, Orlando, Fla., Oct. 1993), pp. 91-111 in Keilitz, *National Symposium, supra*, note 9 at 110.

⁵⁰ Susan Keilitz, "Court-Annexed Arbitration", (paper for National Symposium on Court-Connected Dispute Resolution Research, Orlando, Fla., Oct. 1993), pp. 35-50 in Keilitz, *National Symposium, supra*, note 9 at 47. See also Brazil, *supra*, note 6 (in App. "C" thereto) at 122-24.

automatically assigned to [ADR] were told that they could nonetheless participate if they so requested. None of these parties did so [in the 1,742 such cases] during the study period.⁵¹

The authors further concluded that:⁵²

Despite the fact that over 80 percent of the attorneys said they would select [ADR] in other cases if it were available, no attorney whose case was not administratively assigned to [ADR] requested to participate in the program...

This indicates that litigants and their attorneys often follow the path of least resistance, simply staying on the track into which they were initially slotted regardless of their judgements about the suitability of that track for their case. What may appear to be complete freedom of choice to participate in alternative dispute resolution may actually result in no real choices being made at all.

If the lawyers who advise their clients on the appropriate use of ADR fully understand the benefits and options, a voluntary ADR process may be preferable. As Rosenberg & Folberg state:⁵³

Studies have shown that a litigant's attorney is the most significant determinant of the party's attitude toward ADR. If the attorney favors ADR and explains its utility to her client, the client is significantly more likely to appreciate and benefit from the ADR process....[B]ecause of attorneys' limited experience with ADR, they may provide poor advice to their clients in selecting the appropriate ADR process.... [Also,] attorneys and parties might not select [an interest-based ADR option, such as mediation] because they are afraid to risk appearing interested in good faith settlement negotiations, even if they are so interested.

One reason for the underutilization of voluntary court-connected ADR may therefore be the strategic posturing by the parties. Parties may fear that initiating settlement discussions will indicate weakness and give the other party a strategic advantage.⁵⁴

Ignorance on the part of the bar is another reason. Brazil has observed that:⁵⁵

Lawyers and litigants frequently do not read material [on court-connected ADR] that is mailed to them, even when that material takes the form of an order from the court. We [judges] have been distressed by the number of times lawyers have asked questions about matters fully covered in material already sent to them. We also have been distressed by how much ignorance there is in our bar about programs, even though we have taken great pains to publicize them. In addition, we have noticed that many lawyers and clients have some vague familiarity with some ADR vocabulary, but tend to blur or confuse different terms or programs, or to assume that every ADR event is either a settlement conference or an arbitration. A clear understanding of a new program that has any unique procedural features or objectives is very difficult to generate.

Although the Ontario Bar probably is not yet generally in a position to give informed advice to clients about ADR, this deficiency eventually may be remedied as Ontario lawyers

⁵¹ *Supra*, note 20 at 1535-36.

⁵² *Ibid.* at 1538-39.

⁵³ *Ibid.* at 1541. Also see Feld & Simm, *supra*, note 24, at 84-87.

⁵⁴ See, for example, Rosenberg & Folberg, *supra*, note 20 at 1512-1513; and Hon. Mr. Justice Adams, *supra*, note 36 at 2-3.

⁵⁵ *Supra*, note 6 at 75-76.

gain greater familiarity with—and expertise in—ADR techniques. At that point in time, a voluntary ADR program may be desirable, with the parties deciding when and whether to attempt ADR, and the ADR process to be employed. Until then, however, informational deficiencies within the Ontario bar constitute a significant rationale for mandatory ADR aimed at preventing “market failure” in the field of dispute resolution. We believe that the observations of commentators such as Rosenberg & Folberg and Brazil are applicable to Ontario. The parties to a lawsuit rely on their respective lawyers for advice about alternatives to litigation, but, at present, members of the Ontario bar typically lack sufficient knowledge—either about ADR generally or at least about certain modes of ADR—to be in a position to give adequate advice.

(d) CONCLUSION

We believe that mediation should generally be required for the parties to a civil dispute. At present, there is a significant likelihood that the parties would lack sufficient information about dispute-resolution processes to have an adequate basis for deciding whether to attempt ADR prior to trial. Further, even if the Ontario bar were truly well-informed about ADR, the parties may—in the absence of court-mandated ADR—be unduly hesitant to attempt to resolve their dispute, despite obvious reasons for doing so. As Mr. Justice Adams has pointed out:⁵⁶

[E]arly interest in settlement may be misinterpreted as a sign of weakness. Settlement efforts, therefore, are frequently postponed until the parties “wear each other down” or until the eve of trial when the pressure for examining the alternatives to a trial is at its greatest. Unfortunately, engaging in communication when the parties have been worn down or at the “eleventh hour” carries its own risks. At such times, the parties are unlikely to be at their best. Trust and communication may suffer from the present impact of past adversarial contacts. As a result, opportunities for elegant, creative and satisfying solutions may be lost forever.

He further notes the potential role of court-mandated mediation in producing more timely resolutions:⁵⁷

Mediators can provide the excuse for negotiations at the earlier stages of a dispute which enables the parties to avoid “the sign of weakness” previously mentioned. In fact, a simple mediation contact may be a sufficient “official response” to a problem. Parties may only require one such court-sanctioned meeting to unlock the dialogue necessary to resolve a problem.

8. SHOULD MEDIATION BE PUBLICLY FUNDED?

(a) INTRODUCTION

Having determined that parties should be required to attend a mediation session early in the litigation process, we must determine whether the mediation should be publicly funded, and if so, to what degree and by whom.

⁵⁶ *Supra*, note 36 at 2-3.

⁵⁷ *Ibid.* at 4.

As discussed below, our conclusion is that the provincial government should subsidize a nominal portion of the cost of the parties' use of the services of private mediators if—and only if—the dispute is settled at the mediation or within fourteen days afterwards. If there is a settlement, it would be appropriate for the Ontario Government to pay a small sum toward the mediation costs that the parties incur, and the parties should absorb the balance of the costs. However, the parties should absorb all of the costs if the dispute does not settle.

If the matter settles, the payment by the government should be more than compensated for by the fact that there should be no further administrative costs. For instance, costs attributable to the time of a judge, master or other judicial or administrative officer to deal with motions on procedure or discovery, pre-trials, trials and execution on judgments should not be required.

(b) SOURCES OF FUNDING

Funding for court-mandated ADR need not come directly from government. A 1991 report of the New South Wales Law Reform Commission discussed funding of court-connected ADR as follows:⁵⁸

6.35 Various sources of funding may be available for experimental programs in courts and tribunals, including governments, statutory interest accounts, the Law Foundation, philanthropic organizations, legal aid, professional *pro-bono* activities and financing, filing fees, and direct fee-for-service payments.^[59] Existing programs rely on substantial government funding, although in some the parties pay the direct costs of the neutral third party. The best mechanism for financing is not obvious. The option chosen will reflect available resources, as well as the nature of the disputes, including the amount at stake, the parties' resources, whether court or external personnel are used and whether participation is voluntary or mandatory, as well as the program objectives.

State funding

6.36 Controversy surrounds the view that the State should provide and heavily subsidize dispute resolution options other than litigation.^[60] It is argued that the external benefits flowing from the reduced demand for scarce judicial and court resources are sufficient to justify the State accepting this financial responsibility. It is not only the parties themselves but other users of the court system who benefit from the effects of higher settlement rates. Cost savings in court time and personnel may more than offset the public investment in ADR, and other intangible benefits may flow to the community from less reliance on litigation.^[61] On the other hand it is believed that the substantial benefits to

⁵⁸ NSW LRC, *supra*, note 17 at 79.

⁵⁹ The Canadian Bar Association in 1989 identified the following potential sources of funding for ADR projects: (1) municipal governments; (2) provincial attorneys general departments; (3) various federal government departments; (4) community donations; (5) client fees; (6) private philanthropic organizations; (7) law foundations; (8) fees from related ADR training services; (9) corporate sponsorship; and (10) costs recovery fees. CBA, Task Force on Alternative Dispute Resolution, *Task Force Report: Alternative Dispute Resolution* (Bonita Thompson, Chair), (Ottawa: CBA, 1989) at 69.

⁶⁰ See Rowland Williams, "Should the State Provide Alternative Dispute Resolution Services?" (1987), 6 Civil Justice Q. 142.

⁶¹ Also see Canadian Bar Association, *supra*, note 58 at 70.

parties justify their contribution to meeting costs. No preference can be expressed here. The cost/benefit analysis relies on evidence not readily available, so the question remains open.

In their review of funding of court-connected ADR programs in the U.S., Plapinger & Shaw observed that:⁶²

While full public financing of court-connected ADR has been cited by many as a goal, current fiscal restraints often require courts to fund ADR programs through a variety of public and private means. Common sources of funding...include: legislative appropriations; local court budgets, court filing fees; ADR user fees; foundation grants or bar association assistance.

Brazil warns, however, that designers of a court-connected ADR program should "beware of the risk of compromising the appearance of program neutrality by accepting funding from firms or entities that might appear in your court or that are perceived as having particular kinds of interests in process issues".⁶³

Sander advocates paying for ADR through a general surcharge on court filing fees, as is done in California. He argues that this is fairer than ADR user-pay fees, "since the costs of improving the public dispute system are spread over all litigants, not simply imposed on the immediate disputants seeking to avail themselves of ADR procedures".⁶⁴ Sander acknowledges, however, that "from the point of view of most commercial clients, [ADR user fees] may not pose much of a problem, provided some reasonable ceiling is set on the hourly rate charged by the neutrals, and some control is exercised by the court over the quality of neutrals".⁶⁵

Assuming that public funding is the proper decision, however, sufficient data are unavailable in Ontario to determine definitively the appropriate source of funding.⁶⁶ One of the recommendations of the Civil Justice Review's First Report is "that the concept of court-connected ADR be accepted in principle, with the determination of the appropriate...funding option to await the evaluation of the ADR Centre pilot project..."⁶⁷ Ontario's Legal Aid Program funds some civil litigation for impecunious parties, but the program's finances

⁶² *Supra*, note 18 at 44.

⁶³ *Supra*, note 6 at 106.

⁶⁴ Frank E.A. Sander, "Paying for ADR", [1992 Feb.] ABA J. 105.

⁶⁵ *Ibid.*

⁶⁶ A research paper for the Fundamental Issues Group of the Civil Justice Review, "Costs of Civil Justice" (In-House Research Paper #5), is being prepared at the Ministry of the Attorney General. The paper will compile information on the publicly-funded expenses of the civil justice system, and speculate on the private costs of litigation and ADR services.

⁶⁶ Also see Keilitz, "Court-Annexed Arbitration", *supra*, note 49. Based on her review of the literature on court-connected arbitration, Keilitz notes [at 44]: "There does not appear to be any variance in the effectiveness of arbitration based on whether the parties or the court pays the arbitrators' fees."

⁶⁷ *Supra*, note 1 at 223, being Rec. 4 in c. 13.5. The ADR Pilot Project's evaluation, by Julie MacFarlane and Stitt Feld Handy Houston, is not scheduled for completion until Nov. 30, 1995.

generally are considered to be in a state of crisis.⁶⁸ We also observe that public funding is available to subsidize litigation in certain cases of social significance, as through the federal Court Challenges Program (for Charter litigation) or the funding of recognized intervenors in Ontario environmental assessment hearings.

(c) AMERICAN COMMENTARY

American commentary often suggests that parties should not have to pay for court-mandated ADR services. For example, in 1992 the [U.S.] Center for Dispute Settlement and the Institute of Judicial Administration suggested the following standards:

13.0 Funding of Programs and Compensation of Mediators

13.1 Courts should make mediation available to parties regardless of the parties' ability to pay.

- ...
- b. Where the parties are required to participate in mediation, the costs of mediation should be publicly funded unless the amount at stake or the nature of the parties makes participants' payments appropriate.⁶⁹

Similarly, the U.S.-based Society of Professionals in Dispute Resolution (SPIDR), in its analysis of funding mechanisms for ADR, asserts that: "Except in ... unusual cases, parties who are ordered to use a process should not also be ordered to pay the cost."⁷⁰

Generally speaking, each party in civil litigation in the United States must bear its own legal costs.⁷¹ The so-called "American rule" on costs is quite different from the presumption in Ontario that the unsuccessful party will be ordered to at least partially⁷² indemnify the winning party for its legal costs.⁷³ This policy difference between the Ontario rule and the American

⁶⁸ The question of "the extent to which the public interest calls for the use of Legal Aid to finance private disputes in the courts or through ADR" is not dealt with in this paper. As the *First Report, supra*, note 1 observes [at 131], "a major examination of the Legal Aid system is currently underway by other bodies". For a description of the ADR initiatives of the Ontario Legal Aid Plan in the area of family law, see p. 8 of Larry Fox, "ADR and Other Initiatives in Ontario", App. 1 to "Civil Justice Review—ADR Empirical Study—Research Paper No. 4" (outline for paper, ca. Jan. 1995), (Toronto: Policy Development Division, Ministry of the Attorney General, unpublished).

⁶⁹ Center for Dispute Settlement and the Institute of Judicial Administration, "Executive Summary" of "National Standards for Court-Connected Mediation Programs" (1992), in E. Plapinger, M. Shaw and D. Stienstra, eds., *Judge's Deskbook on Court ADR* (New York: CPR Legal Program, 1993) [reproduced at pp. 71-82 in David & Gamble, *supra*, note 46 at 81].

⁷⁰ Society of Professionals in Dispute Resolution (SPIDR), Law & Public Policy Committee, "Dispute Resolution as it Relates to the Courts: Mandated Participation and Settlement Coercion", [1991 Mar.] *Arbitration J.* 38-47 at 42.

⁷¹ In the U.S., the term "costs" is not understood necessarily to include attorney fees unless expressly provided by statute. Some states have modified American common law by statutorily empowering courts to award costs in certain circumstances.

⁷² Costs generally are awarded on a party-and-party basis rather than a solicitor-and-client basis.

⁷³ This presumption does not preclude reverse indemnification "in a proper case" [Rule 57.01(2)]. An offer to settle made under Rule 49 may have significant cost consequences. As well, "in exercising its discretion under section 131 of the *Courts of Justice Act* to award costs", an Ontario court is [per Rule 57.01(1)] entitled to consider a number of factors in addition to "the result of the proceeding" and "any offer to settle made in writing".

rule may underlie at least some American antipathy towards the notion of user-fees for court or ADR services.

The views of SPIDR on public subsidization of ADR are predicated on the assumption that there should continue to be a "public commitment to provide litigation facilities [essentially] without charging the users".⁷⁴ This assumption is one possible response to the concerns raised by economic analysis about non-optimal use of dispute-resolution mechanisms, discussed below. Another response would be to make private disputants bear expenses more accurately reflecting the full cost of various dispute-resolution processes—including trial.

(d) FISCAL CONSIDERATIONS

Leading ADR expert Frank Sander of Harvard Law School has stated: "To make [court-connected ADR] work, we have to provide funds for it".⁷⁵

Based on his own experiences as a magistrate in charge of institutionalizing two major court-connected ADR programs in California, Brazil observed:⁷⁶

The only way we can be sure that the ADR systems we establish will increase social cohesion, and not increase alienation, is by making them of obviously high quality. Achieving that goal takes a great deal of work, a fact that cannot be over-emphasized and that strongly suggests the wisdom of starting 'small' in this area, i.e. with programs that are not too ambitious at the outset, that are very carefully planned and executed, and for which adequate resources are assured for a substantial period (it can do more harm than good to start a program prematurely, or to launch a program whose quality deteriorates appreciably due to insufficient financial support or inadequate administrative attention). In this area, institutionalization should mean, among other things, building in, from the outset, structural support (financial and administrative) that will fully meet the needs of the program and that is not dependent on the energy and interest of any one human being or small group of human beings.

A 1991 report of the New South Wales Law Reform Commission similarly noted the importance of adequate funding for mandatory ADR:⁷⁷

Financial liability for programs connected to courts and tribunals is another critical issue. Resources in the judicial system are limited, and although consensual processes may be seen as the cheaper alternative, they still require an adequate allocation of resources to be effective. Thus issues of funding should be addressed at the program design stage.

Funding affects not only the actual delivery of ADR services, but important related factors as well. For example, a report on a 1994 Australian conference on court-connected mediation

⁷⁴ *Supra*, note 69.

⁷⁵ *Supra*, note 63.

⁷⁶ Brazil, *supra*, note 6 at 57-58. Also, at 97, in App. "A" thereto ("An Outline of Some Major Questions About Institutionalizing ADR in Courts"), Brazil states: "[For a court-connected ADR program] to be truly institutionalized... the functions that need to be performed must be...made integral... parts of specific job descriptions...and the funding for these positions must be regularized and secured."

⁷⁷ NSW LRC, *supra*, note 17 at 79.

noted that “a lack of resources might inhibit satisfactory supervision” by the court/tribunal of any dispute-resolution processes not conducted in-house.⁷⁸ The same report concluded [at 32]:

Most workshop participants considered that mediation services should be provided at little or no cost to the mediation participants as part of a commitment to allow access by disputants to all dispute resolution processes. The question of “Who pays?” was not, however, fully canvassed although it was noted that it may be unrealistic to expect government to pay for the provision of mediation services in all instances.

In its general discussion of funding, the Civil Justice Review’s First Report states that: “The members of the Civil Justice Review are acutely aware of, and sensitive to, the current climate of fiscal restraint and constraint.”⁷⁹ Indeed, the First Report recognizes that fiscal realities may preclude a mandatory, publicly-financed program of settlement conferences.⁸⁰

It may be that there are simply too few resources in the system to justify this overall settlement conference/trial management approach for all cases, and that there should be some monetary or other limitation below which a case does not qualify for both settlement conferences and trial management conferences. This concept needs to be examined further.

Taking into consideration the current (and reasonably foreseeable) fiscal climate in Ontario, we believe that any proposal for a major program of court-connected ADR is not politically viable—and hence realistically is not “achievable”—unless it can be financed without substantial new funding from the Province.⁸¹

(e) THE ANOMALY OF SUBSIDIZING TRIAL BUT NOT ADR

In his economic analysis of ADR as an alternative to trial, Shavell argues that:⁸²

[P]arties who use the courts do not at present pay the full costs of the public services that are thereby rendered to them, whereas one presumes parties do pay the full costs of ADR. Thus, ADR appears more expensive in comparison to the courts than it really is, and ADR might thus be used less often relative to the courts than would be best.^[83] ... As an antidote to this problem of relative pricing, ADR could be subsidized. But that would not offer a full solution to a problem that emanates from failure to charge completely for use of the courts: if ADR is subsidized along with the courts, both methods of dispute resolution will be cheaper to use than they truly are for society to provide, leading

⁷⁸ Tania Sourin, Marilyn Scott, and Jennifer David, *Court-Connected Mediation: National Best Practice Guidelines* (Sydney, Aust.: Centre for Dispute Resolution, 1994) at 32-33.

⁷⁹ *Supra*, note 1 at 378.

⁸⁰ *Ibid.* at 231.

⁸¹ Russell suggests that one “characteristic which a civil justice reform package should have if it is to be attractive to a reform-minded AG and reasonably saleable to his or her Cabinet colleagues... is that at the very least it not cost much money—and preferably that it can be advertised as potentially leading to a reduction of public and private spending on dispute resolution”: Peter H. Russell, “The Politics of Civil Justice Reform in Ontario” (1994), (paper for Symposium of the Fundamental Issues Group of the Civil Justice Review of the Ontario Law Reform Commission/Ministry of the Attorney General, Toronto, Nov. 19, 1994).

⁸² Steven Shavell, “Alternative Dispute Resolution: An Economic Analysis” (1995), 24 J. Legal Studies 1-28 at 8.

⁸³ A similar point is made in Sander, *supra*, note 63.

to overutilization of each. Other things being equal, the appropriate policy would seem to be to subsidize neither.

A significant point not raised by Shavell is that if any dispute-resolution processes are subsidized, private parties will, from society's perspective, tend to underinvest in dispute-prevention activities, such as contractual drafting, systems of private ordering,⁸⁴ and accident prevention. For example, individuals and corporations may tend not to exercise as high a standard of care as they should (thereby making personal injuries and property damage from negligence more likely).

Besides the need to provide proper incentives for the use of various dispute-resolution processes, and for dispute-prevention activities, there are other reasons for ADR user fees. Denison identifies four additional rationales—namely, to: “reimburse neutrals; professionalize the area of dispute resolution; prevent ADR from being considered a second-class justice system; and create self-supporting projects”.⁸⁵

For these reasons, we conclude that court-connected ADR should not as a general rule be publicly subsidized.

(f) EFFECT OF USER-FEES ON POORER PARTIES

Some have expressed a concern that if the costs of ADR must be borne by the parties, ADR will merely become another stage in the process and make it more difficult for poor litigants with valid claims to afford litigation: “If parties are required to pay for a mandatory process, will litigants of lesser means be discouraged from pursuing claims?”⁸⁶ Keilitz, Hanson & Clarke conclude that:⁸⁷

Whether or not to charge litigants fees for dispute resolution services is a topic of concern to those who fear that fees will deny less affluent litigants access to high quality dispute resolution processes. Both the National Standards for Court-Connected Mediation Programs and Report #1 of the Law and Public Policy Commission of the Society of Professionals in Dispute Resolution advocate that parties should not be required to bear the costs of participation in court mandated dispute resolution.... To ensure equal access to dispute resolution programs, courts should waive fees for litigants who can demonstrate that paying the fee would constitute an unreasonable burden.

⁸⁴ See, for example, Lisa Bernstein, “Project Summary—The New Law Merchant: Private Commercial Law in the United States” (Law & Economics Workshop Series No. WS 1994-95 (9)), (Toronto: U. of Toronto, Faculty of Law, 1995). Bernstein has catalogued how a number of trade associations have developed substantive rules of commercial transactions that are interpreted and enforced in association-run arbitral tribunals. She suggests [at 14] that these regimes have developed “not only to avoid the cost and delay involved in resolving disputes through the court, but also to alter the substantive rules used in commercial disputes [so as] to reduce the incidence of commercial disputes requiring third-party intervention, and to secure more rapid and certain compliance with third-party decisions when disputes do arise.” The degree to which subsidies of court process deter parties from activities that will “cause” litigation is arguably different between Canada and the US because of differences in cost awards.

⁸⁵ Timothy J.A. Denison, “Paying for Dispute Resolution Programs: A Discussion Paper Addressing the Viability of User Fees” (Ottawa: Ministry of Justice, Compliance and Aboriginal Justice Sector, Dispute Resolution Project, 1993) at 5.

⁸⁶ Keilitz, *supra*, note 49 at 38.

⁸⁷ *Supra*, note 13 at 15.

In the court-mandated ADR program in the Northern District of California, the parties generally do not pay for the services of the neutral third party. However, Rosenberg & Folberg found that in some of the cases where a (voluntary) follow-up session was held, the parties paid the neutral substantial amounts.⁸⁸ The authors go on to state:⁸⁹

We suggested above that courts should excuse litigants for whom participation in ADR might represent an unreasonable cost or imposition. To the extent that ADR participants must pay fees, the court ought to include those fees with the other costs of participation in determining whether it constitutes an undue burden. In addition, litigants who are entitled to the waiver of other fees due to their financial condition ought to be equally entitled to waiver of any court-imposed ADR fees.

...

If [government] funds are not available, the court is faced with the options of employing a process that is well-run but costs litigants some money, employing a free process that lacks consistent high quality, or disregarding ADR altogether. We suggest the first approach.

If there are parties who legitimately cannot afford the extra cost of the mediation, their expenses should be subsidized. This can be accomplished either through the current Legal Aid system, or through other means. All of the costs of the mediation should be subsidized if a party cannot afford those costs:

The costs of ADR include the party's own time and transportation costs, attorney's fees for preparation and participation in ADR, and any possible payment for services of the neutral. A litigant ought to be excused from ADR if she establishes that (1) there is a reasonable likelihood that these costs will exceed the value of reasonably foreseeable benefits from ADR (e.g. reduced discovery and trial preparation costs) or (2) she is unable to pay these costs, either because she has few resources or because the costs substantially outweigh the other costs of litigation.⁹⁰

(g) ALLOCATION OF MEDIATION COSTS BETWEEN PARTIES

In civil litigation in Ontario a victorious party is usually at least partially indemnified for the costs of the litigation. In contrast, a mediation process is not designed to determine a winner and loser, but rather to produce a negotiated resolution that is responsive to the parties' respective interests. We believe that a user-pay system of court-connected mediation thus should have a rule that subject to the agreement of the parties to another arrangement, each party bears an equal share of the costs of the mediation whether it yields an agreement or not.

(h) CONCLUSION

Designing a mediation system that is effectively funded, while balancing all of the competing interests set out above, is obviously a difficult task. In our opinion, the system should recognize that savings accrue to the judicial system if the parties settle the litigation at an early stage of the proceedings. For instance, if some pre-trial conferences, motions related to discovery, motions related to procedure, trials, and judgment execution costs are reduced or eliminated, judicial and court resources would be saved.

⁸⁸ *Supra*, note 20 at 1528.

⁸⁹ *Ibid.* at 1545-1546.

⁹⁰ *Ibid.* at 1540.

The Ontario Government should therefore subsidize some of the cost of the mediation process if the process does, in fact, result in a settlement. However, the Province should not be the primary source of funding for the mediation process. Parties who are able to afford to do so should bear the bulk of the cost of the mediation. We should not conclude—merely because the market for dispute-resolution services is skewed by public subsidization of judicial services—that it is appropriate or desirable for the public to fully fund mediation services, even if such services are mandated.

We therefore recommend that where a lawsuit is settled at, or within fourteen days of, the mediation, the government subsidize the cost of the mediator's services up to a set amount equivalent to an experienced mediator's average hourly rate in the province (approximately \$200), while the parties should absorb the balance of the costs. However, the parties should absorb all of the mediation costs if the dispute does not settle.

In situations where a litigant cannot afford the mediation, however, that individual should be able to obtain the necessary funding to proceed with the mediation.

9. WHO SHOULD MEDIATE?

(a) INTRODUCTION

The Terms of Reference of the Civil Justice Review mandate inquiry into "the role of private industry in providing alternative methods for parties to resolve issues without resorting to the judicial process."⁹¹ Clearly, the private sector has already taken a significant role in providing services to disputants, and its role has been encouraged by Ontario's civil justice system.

The preamble of the Practice Direction for the ADR Centre states that:

[T]he parties may choose to utilize private A.D.R. services instead of those provided [through the A.D.R. Centre established] by the Court, in which case the parties will be responsible for fees charged by the private A.D.R. service providers. A directory of available private A.D.R. service providers will be available at the A.D.R. Centre.⁹²

That Practice Direction contains the following provisions under the heading "Choice Between Court-Based and Private A.D.R. Services":

3.1 Nothing in this practice direction limits the ability of litigants to resort to private A.D.R. service providers as a means of resolving disputes [referred to the A.D.R. Centre] . . . and in fact, resort to such services is encouraged.⁹³

The [U.S.] Center for Dispute Settlement and the Institute of Judicial Administration suggests the following:⁹⁴

13.0 Funding of Programs and Compensation of Mediators

...

⁹¹ *Supra*, note 3.

⁹² *Supra*, note 42 at 482.

⁹³ *Ibid.* at 484.

⁹⁴ *Supra*, note 68 at 81.

13.3 Where public funds are used, they may either: (a) support mediators employed by the court or (b) compensate private mediators. Where public funds are used to compensate private mediators, fee schedules should be set by the court.

13.4 a. Where courts offer publicly funded mediation services, courts should permit parties to substitute a private mediator of their own choosing except in those circumstances under which the court has decided that party choice is inappropriate. Parties should have the widest possible latitude in selecting mediators, consistent with public policy.

b. Where parties elect to pay a private mediator, they should be permitted to agree with the mediator on the appropriate fee.

Rosenberg & Folberg have found that participant satisfaction strongly relates to the identity of the neutral third party. They recommend that if there is no system that enables the court to guarantee the quality of all neutrals in its pool, a participant should have some input into selecting the neutral for her case. They accordingly suggest that the court provide ADR participants with a list of four potential neutrals, from which the parties may agree on a selection, or else each party may strike one name and have the court make the final selection. However, they note that:⁹⁵

Some litigants will probably want complete freedom to select a neutral... and will be willing to pay whatever fee that neutral charges. We suggest that if all parties agree, they may retain, at their own expense, any neutral [in the court's pool]. . . so long as they do so prior to being assigned a neutral by the court. Allowing such choice will: (1) increase satisfaction with the program by ensuring that parties can retain the evaluator of their choice; (2) better ensure that all evaluators, however selected, are qualified, competent, and adequately trained; (3) minimize complaints of second-class treatment by those unable or unwilling to pay an evaluator's private fee by ensuring that all litigants have access to an identical pool of evaluators. . . .

We are of the opinion that litigants should have the opportunity to select the mediator for their case, from a pool of available and pre-approved mediators.⁹⁶ This is not akin to selecting a judge: the mediator is in charge of the process of the mediation, not the substance of the dispute.

Should it wish to do so, the government could maintain some control on the fees that private mediators are permitted to charge. SPIDR notes the need for proper regulation of fees in relation to presumptively mandatory court-connected ADR: "If not properly regulated, dispute resolution user fees can result in undesirable coercion to settle for the parties who cannot afford them and in unseemly practices though which the court provides lucrative employment to private providers."⁹⁷

The development of standards for mediations and the regulation of mediation practitioners and fees are beyond the scope of this paper. These questions have been circulating for some time, but no agreed standards have developed, and no regulatory body exists. Service providers, and private associations may have standards for their members, but none is

⁹⁵ *Supra*, note 20 at 1548.

⁹⁶ See Society of Professionals in Dispute Resolution (SPIDR), Law & Public Policy Committee, "Public Encouragement of Private Dispute Resolution: Implications, Issues and Recommendations" (Committee Report #2), (Washington, D.C.: SPIDR, 1993) at 14, Rec. 4.

⁹⁷ *Supra*, note 69 at 42.

officially sanctioned in Ontario. In our view, while philosophical arguments may exist for an unregulated system, it is not unreasonable for the government as potential funder to establish criteria and standards for those who wish to become "approved" mediators. The court-annexed ADR centre is currently considering this question.

Assuming standards can be developed, we envision the simplest of systems: a registry for those who qualify, with self-directed submissions of information, and periodic submission of updated information.

(b) PRIVATE VERSUS PUBLIC SECTOR PROVISION OF MEDIATION SERVICES

An important question then becomes whether the pool of neutrals from which the mediator is selected should include only public (government) employees, only private providers of mediation services, or both.

In its analysis of process-serving, the Civil Justice Review's First Report states that "In principle, the Review is of the view that government should not be providing services where these may be readily available elsewhere".⁹⁸ We suggest that this reasoning be extended to the provision of mediation services, even though the mediator obviously does not provide a purely mechanical service such as process-serving.

In Ontario, no one would doubt that the ADR field is growing rapidly.⁹⁹ Mediators are being trained in Ontario in ever-increasing numbers.¹⁰⁰ There are qualified mediators in the private sector in Ontario who are available to provide mediation services.

Interest-based mediation is not a situation akin to judging where the neutral must have a firm grasp of the legal intricacies raised by the case. The mediator is a process expert, assisting the parties to negotiate an agreement.

There are good policy reasons, we believe, to set up a program where the mediators used are those from the private sector, not government employees. First, the cost associated with establishing a public system will be avoided. If the mediation system is government-run, then elaborate record-keeping and other bureaucratic procedures will be necessary for governmental accountability. Any regulated system faces the danger of becoming "litigation-like", and creating the unwanted formal characteristics that ADR is attempting to avoid.

In contrast, providers of mediation services in a private-sector-based system will presumably be more efficient and effective in resolving disputes, by necessity. Mediation services are not well known to the public, and, providers are not necessarily adequately trained or sufficiently numerous, though there are numerous new entrants now in the field. However, it may not be possible to find convincing data to support market driven model. However, as in other industries, over time there will presumably develop educated consumers and efficient and exceptional practitioners. In fact, the drive towards ADR has largely been fuelled by educated consumers who seek a more efficient and effective resolution than that offered by litigation.

⁹⁸ *Supra*, note 1 at 254.

⁹⁹ For example, the elections for the Executive of the ADR Section of the Canadian Bar Association (Ontario) was the most hotly contested election of all sections of the CBAO, despite the fact that the section was only formed in 1992. Source: personal communication with Carol Humphries of the CBAO.

¹⁰⁰ The University of Windsor's certificate program in ADR (taught by Stitt Feld Handy Houston) has trained over 350 people in negotiation and mediation skills since the fall of 1994.

If disputes are resolved by government employees, this will entail either hiring new civil servants, or reassigning existing employees. If existing government employees are used, there are two potential problems. Firstly, these people will presumably require significant and costly training to suit them to their new positions. Secondly, these employees will not be available to perform the functions for which they were initially employed and replacements will be required. If new employees are hired, the government will have to pay significant salaries and benefits to attract mediators with reasonable skill levels or will have to undertake the training of inexperienced employees. At this time of public restraint, it is not necessarily appropriate to create a substantial new drain on the public purse, where the private sector is already able to provide the service.

Some would argue that judges are best suited to mediate disputes. While judges are uniquely suited to give advisory opinions (as they do in pre-trials), we believe that it would not be a wise use of scarce judicial resources to have judges focus on negotiations or interest-based mediation at the expense of judging, a role for which they were appointed and trained and have developed or are developing expertise. If judges mediate disputes, then they are not available to conduct trials, appeals, and other judicial proceedings.

The First Report notes that "Judges are the scarcest and most expensive human resource in the system. It is important to prioritize the allocation of their time and efforts so that they may concentrate upon those functions that judges are appointed to perform in society."¹⁰¹ That is not to suggest that judges will have no role in resolving disputes outside their roles as "judges". For example, judges can provide services in "early neutral evaluation" by giving the parties non-binding opinions (as is done now in pre-trials) early in the litigation process, to provide parties with a realistic assessment of the merits of their case.¹⁰²

(c) POTENTIAL ABUSE OF RIGHT OF ACCESS TO GOVERNMENT MEDIATION ACTIVITY

We are concerned that there may be a further and significant danger if the court-mandated mediators are judges or government employees. An argument might be made that the public and the press have a common-law and constitutional right of access to the mediations to assess the conduct of the mediators qua government actors. This would undermine the fundamental premise of interest-based mediation: that the mediation sessions must be private and confidential. For mediations to proceed effectively, the parties must be certain that the mediation sessions will be confidential and that information disclosed to the mediator will not be disclosed to the public. However, if the public is excluded from a mandatory forum in which a government employee—whether a judge or a dispute-resolution officer—is in charge of a dispute-resolution process, there may be a breach of s. 2(b) of the Canadian Charter of Rights and Freedoms and the common law right of access to the courts.

The general principle in Ontario is that all court hearings must be open to the public.¹⁰³ As was stated by the Ontario Court of Appeal:¹⁰⁴

¹⁰¹ *Supra*, note 1 at 193.

¹⁰² The leading resource on early neutral evaluation is Rosenberg & Folberg, *supra*, note 20.

¹⁰³ *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 35(1).

¹⁰⁴ *Southam Inc. v. R. (No. 1)* (1983), 149 D.L.R. (3d) 408 (Ont. C.A.) at 414 and 418.

There can be no doubt that the openness of the courts to the public is one of the hallmarks of a democratic society. Public accessibility to the courts was and is a felt necessity; it is a restraint on arbitrary action by those who govern and by the powerful.

....

It is true, as argued, that free access to the courts is not specifically enumerated under the heading of fundamental freedoms but, in my view, such access, having regard to its historic origins and necessary purpose already recited at length, is an integral and implicit part of the guarantee given to everyone of freedom of opinion and expression which, in turn, includes freedom of the press. However the rule may have had its origin, as Mr. Justice Dickson pointed out, the "openness" rule fosters the necessary public confidence in the integrity of the court system and an understanding of the administration of justice.

The Supreme Court of Canada has stated:¹⁰⁵

The cases mentioned, however, and many others which could be cited, establish the broad principle of "openness" in judicial proceedings, whatever their nature, and in the exercise of judicial powers. [Emphasis added]

In the *Edmonton Journal* case (1989),¹⁰⁶ the Supreme Court of Canada struck down an Alberta statute that restricted what the press could report about civil trials in matrimonial cases. The Court was unanimous in finding that the publication restrictions violated subsection 2(b) of the Charter, and a majority held that this violation could not be saved by section 1 of the Charter because the restrictions were excessively broad.

In order to maintain the integrity of the system of the administration of justice, there must be a rule of openness to the judicial process. Where the exclusion of the public is pre-established and absolute—as opposed to being decided on a case-by-case basis, with a presumption of openness—such an exclusion arguably comprises a breach of s. 2(b) of the Charter not saved by s. 1 of the Charter.¹⁰⁷

This statement does not imply that all aspects of court processes are or should be public. Certain aspects of litigation in which the government and the judiciary are not involved (such as discovery) are not and should not be public.¹⁰⁸ The question of whether the public would have access to a mediation conducted by a governmental or judicial mediator presents the tension between the right of the public to view its government at work and the need for privacy in mediation. ADR experts Goldberg, Sander & Rogers believe that: "The case for openness is strongest in court-connected processes because they are publicly funded and directed... [although] that fact in itself is not dispositive."¹⁰⁹

If the mediators are judges or government employees in a state-sanctioned ADR program, we fear an argument could be made (presumably by a third party, such as a journalist seeking access to mediation notes) that the necessary pre-condition of excluding the public from all

¹⁰⁵ *N.S. (A.G.) v. MacIntyre* (1982), 132 D.L.R. (3d) 385 (S.C.C.) at 402, per Dickson J. (as he then was) writing for the majority.

¹⁰⁶ *Edmonton Journal v. Alta. (A.G.)* (1989), 64 D.L.R. (4th) 577 (S.C.C.).

¹⁰⁷ See *ibid.* and Southam, *supra*, note 103.

¹⁰⁸ See, for example, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984).

¹⁰⁹ *Supra*, note 7 at 288.

mediations may run contrary to the Charter right of freedom of the press including the right of the public to have access to state-conducted dispute-resolution processes. Similar arguments have already been raised in the US.¹¹⁰ For reasons set out below, this argument may be enhanced where expertise in mediation already exists in the private sector.

If officers of the state participate in the dispute-resolution process—especially if they take charge of it—the public may have a constitutionally presumptive right of access. Those seeking access to a mediation could argue that without public scrutiny, there is no way to determine whether a judge or government official serving as the mediator is acting in a coercive manner—such as by attempting to suppress valid claims—and whether illegitimate aims of the state are being promoted under the guise of confidentiality.

Because there are well-qualified private mediators, a breach of the fundamental freedom of the press may not be saved by section 1 of the Charter.¹¹¹ The objective of fostering settlement of civil disputes that would otherwise take up state resources may well be sufficient to warrant overriding the constitutionally protected right of openness of the courts and judicial system. However, one could argue that a state-sanctioned ADR program using government employees as mediators does not impair as little as possible the right of freedom of the press. Among the reasonable alternatives open to the government is the use of private mediators instead of government officials to mediate disputes. That alternative would arguably satisfy the objectives of a mediation system, and yet avoid the state action that could entail a breach of the freedom of the press. Private mediators would be able to respect the need for confidentiality in the dispute resolution process, while there would be no additional restrictions on the press' ability to investigate government action.

In addition, the use of private mediators would restrict the government's access to information about the private disputes of its citizens, and prevent the government—under the guise of conducting mediations—from collecting additional information from disputants. The use of private mediators therefore enhances the right to privacy.

In this context, a mediation can be contrasted with the pre-trial conference. In proceeding to pre-trial, the parties have taken the irrevocable step of submitting, albeit informally, to an analysis and opinion in their case, in a forum where judges are uniquely qualified to opine specifically on the merits of the issues in the litigation.¹¹² Unlike mediation, which is interest-based and allows the parties to deal with a range of issues and interests outside of the legal rights raised in their civil pleadings, the pre-trial is based on the state's potential enforcement of legal obligations and rights of the parties as set out in their public documents. Where dealing with rights-based processes, such as judge-conducted pre-trials settlement conferences

¹¹⁰ Note the Virginia trial court's decision in *Richmond Newspapers v. Morris*, Record No. 90136 (Va. Sup. Ct. 1990), a case that was settled while the appeal was pending.

¹¹¹ See *R. v. Oakes* (1986), 26 D.L.R. (3d) 200 (S.C.C.)

¹¹² See *Condessa Z Holdings Ltd. v. Rusnak* (1993), 104 D.L.R. (4th) 96 (Sask. C.A.), where the Court unanimously held that the judge who conducted a settlement conference is not compellable to testify in subsequent proceedings arising out of the settlement conference. Similarly, a U.S. federal District Court recently held that the press and public have no right of access to a judge-conducted settlement conference: *B.H. v. Ryder*, 856 F.Supp. 1285 (N.D. Ill. 1994).

and early neutral evaluation, there is arguably no other option that achieves the state's objective and yet impairs the freedom of the press as little as possible.¹¹³

A further concern may arise if the mediator is a government employee. The state has certain duties of disclosure to its constituents that the private mediator does not have. If, during the course of the mediation, the government-employed mediator learns information which he or she should disclose to the public due to her role as a government employee, the mediator will be placed in an awkward position of breaching either her duty to the public, or her duty to the parties.¹¹⁴ Of course, if parties feel constrained from disclosing information to the government mediator, the mediation process will not work effectively.

(d) CONCLUSION

There are sound policy reasons for exclusively private-sector provision of mediation services: fiscal restraint; avoiding duplication of services; avoiding bureaucratization and backlogs; and avoiding conflicting duties of confidentiality and disclosure. There are also potential constitutional issues that may arise if judges or government employees serve as mediators. We therefore recommend that Ontario require litigants to attend mediation sessions with private mediators, a formula that is currently working in both Florida and Texas.¹¹⁵ We believe that there is no compelling reason for the Ontario government to become a large-scale provider of mediation services to litigants.

In contrast, we believe that amendments to the Civil Justice system should recognize that mediation processes could be made attractive for parties to use on their own, at a stage that will reduce the need for more expensive but less comprehensive adjudication.

We believe that the parties should be free to select the mediator of their choice from among a pre-approved pool of mediators, perhaps by being given a list of names of four approved mediators (randomly selected), and being independently invited to rank the mediators. The mediator with the highest combined ranking could then be selected. In our opinion, it would not be improper for the government to impose some standards and fee schedules on private mediators.

It is important to understand that these proposals are not somehow seeking to abandon the judicial system. We agree with SPIDR's admonition that: "Increased use of private dispute-resolution processes should complement, not replace, continued efforts to improve the public justice system."¹¹⁶

If properly integrated into the civil justice system, private mediation will complement public litigation processes. For those cases that proceed, we do not in this paper seek to deal with subsequent questions related to changes to the litigation process. Pre-trials based on legal

¹¹³ A similar analysis would apply to a mini-trial: see *Cincinnati Gas & Electric Co. v. General Electric Co.* 854 F.2d 900 (6th Cir. 1988), cert. denied *sub nom. Cincinnati Post v. General Electric Co.* 489 U.S. 1033 (1989).

¹¹⁴ Of course, in certain situations a mediator from the private sector may face similar questions arising from her own sense of ethics and obligations. Cases in the family arena where evidence of abuse is uncovered, for instance, are examples where extremely difficult issues are raised. A government employee may have specific legal, rather than moral or ethical obligations, however.

¹¹⁵ Goldberg, Sander & Rogers, *supra*, note 7 at 291.

¹¹⁶ *Supra*, note 95 at 10.

rights may still be a useful exercise to prevent trials, for instance, and may still be appropriate even if mediation has occurred.

10. SHOULD COURTS ENFORCE MEDIATED SETTLEMENTS?

Courts should be able to supervise mediated settlements of proceedings only on grounds similar to those on which they would interfere with a privately-negotiated settlement of a dispute.

In his discussion of mistake of law, Waddams observes that in cases of compromise of a legal claim,

...the agreement of the parties is intended to allocate the risk of possible defenses. The payer takes the risk that there might have been a defence; the claimant takes the risk that he might have recovered more. That is the meaning of an agreement to settle a claim.¹¹⁷

Kellock J., writing for the majority of the Supreme Court of Canada in *Deeks Sand*, expressly rejected the proposition that “a claim which may subsequently be determined to be unfounded in law, cannot validly form the basis of an agreement of compromise”¹¹⁸. Instead, he adopted [at 345] the following summary of authorities set out in *Dixon v. Evans*:¹¹⁹

In dealing with a compromise,.... [the test is whether the agreement] is an honest settlement of an existing dispute. That is the characteristic of a compromise, and if it be not manifestly *ultra vires* of the parties, it is one that a Court of Justice ought to respect, and ought not to permit to be questioned.

Although there are exceptions to the general rule—e.g. a compromise of a fraudulent claim or a fraudulent defence may not be legally enforceable—such an analysis of contract law is beyond the scope of this paper.

In our view, mediated settlements should generally be enforceable. They are or will generally be, subject to review by counsel before they are accepted. A terrible agreement would hopefully be rejected if it strayed far from the legal obligations of parties, or would at least be entered into with a clear appreciation of its faults. On this basis, courts should have significant respect for and resistance to overturning or amending mediated settlements, but should be prepared to enforce them if necessary.

One advantage of mediated solutions should be the willingness of parties to implement settlements because they themselves are responsible for the substance of them and because they were entered into freely, rather than being imposed. Again however, there is no comparative data regarding subsequent enforcement of mediated settlements as compared to other settlements or judicial enforcement. Until the pilot projects and longer term studies are carried out, we will not be able to make final assessments on such topics.

¹¹⁷ S.M. Waddams, *The Law of Contracts* (2d ed.), (Toronto: Canada Law Book, 1984), at 291.

¹¹⁸ B.C. (A.G.) v. *Deeks Sand & Gravel Co.*, [1956] S.C.R. 336 at 343.

¹¹⁹ *Dixon v. Evans* (1872), L.R. 5 H.L. 606 at 618.

SMALL CLAIMS COURTS: A REVIEW

IAIN RAMSAY

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SMALL CLAIMS COURTS: A REVIEW

IAIN RAMSAY

INTRODUCTION

Small claims courts are often regarded as important symbols for the justice system. Dubbed “The People’s Court” by the media, many writers argue that since this is the court most often encountered by the ordinary person,¹ it is an important symbol for the legitimacy of the justice system.²

Several objectives have been hitched to the star of small claims court reform throughout their history. The idea of access to justice³—in the 1900s for the wage earner and tradesperson—in the 1970s for the consumer—is often associated with this court. But the court has also been conceived as a laboratory for testing new ideas in dispute settlement, such as mediation and arbitration, providing an alternative to the adversary system of the higher courts.⁴ Small Claims Courts have been one focus for the intellectual and political movement

¹ *Civil Justice Review*, First Report (Ontario Civil Justice Review, March 1995) at 284 “it is an area where people are touched most by the system”.

² It is not clear when documents began referring to the court as “the People’s Court” but undoubtedly it may be connected to the TV programme “The People’s Court” which began running in 1981. See footnote 2 in “The Use of mediation in Small Claims Courts” S. Raitt, J. Folberg, J. Rosenberg, and R. Barrett (1993) *Ohio State Journal on Dispute Resolution* (1993) 55 where they note disapproval by a US Circuit Court of Appeal of Judge Wapner’s encouraging of litigiousness over such trivial issues as “two bucks worth of pizza”. We shall question later the empirical truth of this statement but it would be dangerous to underestimate the significance of the cultural image, particularly in an era when much of knowledge about law and legal institutions is mediated through cultural images.

The 1992 National Center for State Courts report on Small Claims Courts and Traffic Courts lists four reasons why we should remain concerned about Small Claims Courts. They “are the forum where American citizens are most likely to experience the legal system firsthand....the way that courts manage and adjudicate small claims cases surely affects the opinions that many citizens hold of the fairness and effectiveness of the ...system...They perform an important societal function...[as] the primary formal mechanism through which the majority of conflicts over contracts and personal injuries are resolved in our nation...[T]here are important and enduring policy questions regarding the nature and purpose of small claims...” *Small Claims and Traffic Courts* J. Goerdts (National Center for State Courts) (1992) at 3-4.

G. Adams argued in 1973 that “the civil justice available in small claims courts has important implications for the integrity of law in general, given the pervasive “touch” of this court.” “The Small Claims Court and the Adversary System” (1973) 51 *Canadian Bar Review* 585 at 587.

Peter Russell argues that “a casual and insensitive approach to the quality of justice [in the small claims court] will indicate a fundamental class bias in a society’s judicial system”. See Peter Russell, *The Judiciary* Chapter 10 at 237.

³ The problematic nature of this concept is I understand being explored by Janet Mosher and Ian Morrison in another paper for the Review. The terms of reference for the Fundamental Issues group refers to the role of the Small Claims Court in providing “effective access to the system”.

⁴ See introduction to Small Claims Courts in “Empirical Studies in Civil Procedure: A Selected Annotated Bibliography” in “Symposium: Empirical Studies of Civil Procedure” (1988) 51 *Law and Contemporary Problems*

of alternative dispute resolution. Within this framework, it has been argued that these courts might contribute to "solving problems" rather than merely "deciding" disputes, becoming a positive force within communities. The court has also been viewed as providing a channel for diverting claims from higher courts, hopefully providing a partial solution to the perceived problems of caseloads in higher courts. The greatest continuity in the role of small claims courts in Canada has however been its role as a low-cost cog in the process of debt collection by business against individuals.

It is clear that there are a variety of objectives which may be attributed to the court: dispute settlement: social problem solving: effective debt enforcement: access to justice. These differing objectives may lead to different prescriptions for reform and make it difficult to make simple judgments about success or failure in relation to these courts.

An important modern perspective on these courts has been to view them as part of the "Access to Justice" movement.⁵ The institution of small claims courts is one response to the "problem" of the small claim, which has often been conceptualized as that of achieving a forum for the vindication of the rights and resolving the disputes of the ordinary individual where the costs (economic, psychological, legal costs) of the existing system of litigation are prohibitive. Cappelletti and Garth argue that the characteristics of such a forum should be "speed, relative informality, an active decision maker and the possibility of litigating effectively without attorneys".⁶ The introduction of small claims courts represents institutional change to make individualized legal justice more accessible to the ordinary individual. But it should be recognized at the outset that the small claims "problem" may be addressed in many ways. Substantive rule changes or public enforcement may reduce or prevent the occurrence of disputes: self-help remedies may reduce the need for third party intervention: developing party capability (e.g. through class actions, public substitute actions) may be a further alternative. Moreover, small claims courts now compete with a variety of other private and quasi-public redress mechanisms in the area of consumption activity. A rational approach to policy cannot view the court in isolation from these mechanisms.

Canada presents a number of models of small claims courts. Most of these courts grew out of earlier Small Debt Courts and it was only in the 1970s that a significant effort was made to rethink the role of these courts. The Ontario model presents a court which is essentially a modified version of the higher courts. There are no restrictions on business filings, or

at 183. "The third era [in empirical research on small claims courts] is distinguished ...by more exacting social science research methods and the new sense that the Small Claims courts offers an excellent tool for the study of dispute resolution methodology". Examples include studies by Vidmar, McEwen and Maiman and Wissler (see Appendix 1).

⁵ See M. Cappelletti and B. Garth *Access to justice: The Worldwide Movement to Make Rights Effective: A General Report*, in Cappelletti and Garth *Access to Justice: A World Survey* Vol. 1 at 3.

⁶ See Cappelletti and Garth, *Access to Justice* Book 1 at p72. J. Ruhnka and S. Weller in *Small Claims Courts: A National Examination* (Williamsburg, Va: National Centre for State Courts)(1978) list speed; low cost; simplicity; self-representation; fairness and effectiveness. In relation to lawyers, Ruhnka and Weller note that discouraging the use of lawyers was "a primary goal of the small claims movement" id. at 4. The European Green Paper notes that a common feature of simplified procedures in countries in the EU is the assumption that legal assistance should not be necessary for a small claim. See *Access to Justice and the Settlement of Consumer Disputes in the Single Market* Commission of the European Communities COM (93) 576 November 1993. In Canada, Adams favoured the presence of lawyers partly because this was related to his preference for maintaining the adversary system in small claims courts. See Adams, "The Small Claims Court and the Adversary Process" (1973) 51 *Canadian Bar Rev.* 583 at 613-615: this view was criticized strongly in two articles by C. Axworthy, see e.g. Axworthy, "A Small Claims Court for Nova Scotia: Role of the Lawyer and the Judge" (1977-78) 4 *Dalhousie L.J.* 311.

corporate claims, lawyers and agents may appear for the parties, the rules of evidence are relaxed and there are restrictions on costs. Quebec, following US precedents, was the first jurisdiction to enact a specific small claims court and remains the only Canadian jurisdiction where the court meets almost all the reform ideals outlined by Cappelletti and Garth. Under the *Loi favorisant l'accès à la justice* of 1971 lawyers were barred from the court, business corporations could not use the court,⁷ judges may mediate as well as adjudicate, are empowered to use the procedure most appropriate to the case and the court provides a conciliation service to litigants. The rules envisage an active role for the judge and there is no appeal. The court currently has a jurisdiction of \$3000.

This paper is divided into six parts. In Part I, I describe the historical development of small claims courts. The historical material outlines important themes and continuities, placing the court against the background of reform movements in civil justice in the twentieth century. Part II outlines differing assumptions about the nature of small claims and the role of the small claims courts. Part III sketches various aspects of the existing court process. Part IV analyzes relevant social science data on certain key aspects of the court. Part V locates the court in relationship to the landscape of consumer disputing. This allows us to place the court in the context of alternative forms of redress mechanisms and to think about its significance in relation to disputes which constitute a significant percentage of its caseload. Finally, Part VI offers some conclusions.

1. HISTORICAL BACKGROUND AND THEMES

(a) ONTARIO

The current small claims court in Ontario has grown out of earlier courts whose primary use was for the collection of debts.⁸ The early courts of requests existed until 1841. These courts were criticized for their excessive informality, corruption and a belief that their procedures facilitated oppression of debtors.⁹ These courts were replaced by the Division Courts in 1841 which were intended to substitute the rule of law, albeit without all the trappings of the adversary system, for "the caprice"¹⁰ of the court of requests. The division courts had limited jurisdiction in actions in contract and tort. There appears to have been no

⁷ This has now been slightly modified to allow small businesses to use the court see Art. 953,3.

⁸ For example, current s. 25. "The Small Claims court shall hear and determine in a summary manner all questions of law and fact and may make such order as is considered just and agreeable to good conscience" is very similar to the earlier provision in the Division Courts Act "...the judge shall hear and determine in a summary way all questions of law and fact and may make such order or judgments as appears to him just and agreeable to equity and good conscience..."

⁹ See (1861) 7 UCLJ (o.s.) 61 and "The Courts of Requests in Upper Canada" by J.B. Aitchison (1949) 41 *Ontario History* 125. See also Howard Baker, *Small claims, communal justice and the rule of law in Kingston, Upper Canada 1785-1819* (1993) (unpublished LL.M. thesis, Osgoode Hall Law School, York University). The article in the Upper Canada Law Journal describes the oppressive use of the courts by creditors. See also Ontario Law Reform Commission, *Report on the Administration of Ontario Courts* (1973) Part III.

¹⁰ Aitchison, above at 131-132 quotes the following statement from the Executive Council "The Courts of Requests being governed by no strict rules of law, everything is left to the discretion and sometimes much more depend, upon the caprice of the Commissioners, who, whether they be right or wrong, must be exposed to imputations of favouritism, or of interested motives, from which non-resident judges or those having a more extended jurisdiction, or those governed by settled principles of Law are in a great measure exempt".

studies of the role of the division courts during the nineteenth and early twentieth century. The Ontario Law Reform Commission notes that from 1851 to 1941 there was “increasing jurisdiction and the development of procedural complexity without any radical change in the configuration of the courts”.¹¹ The Barlow report in 1939 viewed the purpose of these courts to be “a small debts court to enable small claims to be litigated and payment enforced with a minimum of expense and inconvenience” [where] people of small means may collect wages and small accounts at a minimum of expense”.¹² Barlow found the existing court to be expensive and cumbersome to use for the ordinary individual.¹³ He thought that an entire change was needed in the method of collecting small debts and recommended that reforms should follow the US example of establishing small claims courts with a more simplified procedure and lower monetary jurisdiction. He contrasted these “true” small claims courts with the complexity of the division courts.

This small claims model was rejected by the Conant Select Committee on The Division Courts and only modest changes were incorporated in the *Division Courts Amendment Act* 1941. The Select Committee report did however provide some insight into the operation of these courts. There were 78,000 cases in the division courts in 1939, of which 54,000 cases were for claims under \$100.¹⁴ A sample of cases showed an average claim of \$65 with 20% of judgements at trial and a large percentage of default judgments. In one metropolitan court, approximately 35 cases under \$100 would be heard in one day, and on damage cases around 40 to 45. In cases over \$100 approximately 7-8 cases would be heard: these seemed to be cases where legal counsel were involved.¹⁵

The picture was of assembly-line justice in a court which was hearing both relatively small claims and claims for a substantial monetary value. There was also much discussion in the hearings of the possibility of replacing imprisonment for non-payment of debt with income repayment provisions similar to the Quebec Lacombe Law. A modified version of this was introduced in 1950 as the consolidation order.

In 1962, a report by Eric Silk Q.C. for the Attorney General canvassed the views of the bar on the jurisdiction of the division courts. They generally opposed an increase on the basis that with increased formality they would no longer be the “poor man’s court of equity”. The report also documented concern about the contract practices of door-to-door selling companies which used oppressive contract terms which deprived consumers of defences, specified distant

¹¹ Ontario Law Reform Commission *Report on Administration of Ontario Courts* (1973) Part III at 339.

¹² *Interim and Final Report on a Survey of the Administration of Justice* (1939) Master K. Barlow at B33.

¹³ Barlow noted that the out-of-pocket disbursements for a small claim might exceed in many cases the disbursements in a Supreme court action. *id.* at B32. This may have been related to the fee for service nature of much administrative work in these courts. This private enterprise system within the judicial system was described by the McRuer Commission as “unique in the public service”.

¹⁴ See Evidence to Barlow Report of J. Roy Cadwell Inspector of Legal Offices at 1078. The population of Ontario in 1941 was 3.8 million. In 1993-94 there were 134,000 claim and a population of 10 million.

¹⁵ Evidence of Mr. F.G.J. McDonagh, Clerk, First Division Court of the County of York at 1042. The breakdown of actions in the court for 1940 was \$1-10,429: \$10-20, 2016: \$20-60 2624: \$60-100, 1126: \$100-200, 1173: \$200-300, 170: over \$300, 105.

venues for the hearing of cases and were associated with default judgments.¹⁶ In 1968, the Royal Commission of Inquiry into Civil Rights described the court as a debt-collection agency with draconian powers. Their data indicated that hundreds of debtors were being committed to prison for non-payment of debt under extraordinary committal powers available in these courts, a practice which they considered to be "wrong and unjust".¹⁷ They commenced their chapter on division courts with the following comment:

With the many procedures available to a creditor under the provisions of the Division Courts Act to assist in the collection of an outstanding debt, and with the many procedures carried out by officers and judges of the division courts, it is felt by some that the division courts are little more than statutory collection agencies.¹⁸

The Committee also criticized the practice which had developed of appointing members of the bar to sit as temporary judges. They highlighted not only the potential conflicts of interest which arose from this practice, but also as a matter of principle thought that "the judicial function is not one that should be performed by practising lawyers on an ad hoc basis"... [I]t is inconsistent with the traditional principle of the independence of the judges that lawyers in active practice should be sitting as judges one day, and on the next be consulting and advising clients".¹⁹

The title of the division courts was changed to the small claims court in 1970 and the current court is in many respects a modified version of this court. The Ontario Law Reform Commission in its *Report on Administration of the Ontario Courts* in 1973 made many recommendations in relation to these courts.²⁰ These included a recommendation against the use of lawyers acting as part-time judges, experimenting with evening sittings, greater assistance to litigants, and the institutionalization of the Office of referee to deal with debtor repayment plans. The 1970 *Small Claims Court Act* gave the province power to appoint small claims court judges and in 1979 the province appointed several full time small claims courts judges under the auspices of the Provincial Court (Civil Division) to hear cases in Toronto up to \$3000. This court was amalgamated with the small claims court in 1984, which became in 1989 a part of the Ontario Court, General Division.

It may be useful at this stage to reflect on some of the themes which arise from this brief historical introduction. There remain significant continuities between the present court and the earlier division courts: its role as a low-cost cog in debt collection, a heavy reliance on part-time judges to staff the courts, and undercurrents of concern that its informal procedures may facilitate sharp practices by a minority of businesses trading primarily with lower income consumers. Reforms to the small claims court system in Ontario have not attempted to provide

¹⁶ See Report to Kelso Roberts of certain studies of the Jurisdiction of County and District courts and Related Matters by Eric Silk Q.C. (1961) at 107-108. An example of this type of fraud is provided by the contemporary case of *Federal Discount Corp. v. St. Pierre* [1962] O.R. 310 (Ont. C.A.)

¹⁷ *Royal Commission of Inquiry into Civil Rights: Report Number One* at 639. Powers of committal to jail for disobedience of a judge's order to pay money were repealed in 1969. See Division Courts Amendment Act 1969 S.O. 1968-69 c.30 ss. 4, 5, 6, 7, 8, 12.

¹⁸ *Id.*, Vol. 2 at 621.

¹⁹ *Id.* at 627.

²⁰ *Id.* at 361.

a radical alternative to the higher courts or an institution fashioned from new cloth after extensive analysis of comparative models of dispute settlement. Finally, notwithstanding the changes over the past twenty years, including the introduction of "experimental" courts, there has been little attempt by successive governments to conduct systematic quantitative or qualitative research on these courts.²¹

(b) SMALL CLAIMS COURTS AND REFORM MOVEMENTS IN CIVIL JUSTICE²²

There have been a number of reform movements which have focused on the role of small claims courts. While these have been primarily US in origin, they have influenced Canadian ideas and debates on the role of small claims courts. Three themes are outlined: justice for the wage earner and tradesperson; small claims courts as instruments of oppression in debt collection; and small claims courts and consumerism.

(i) Justice for the Wage Earner and Tradesperson: The Progressive Movement²³

In early twentieth century USA there was much discussion by elite lawyers and legal academics about the ability of the justice system to adapt to the urbanization and industrialization of the period with significant immigration and population changes. There was a concern, echoed in later studies in the 60s, that a failure to provide adequate mechanisms for redress to the small wage earner or tradesperson might result in social disorder. Reginald Heber Smith in his famous book *Justice and the Poor* worried that if accessible justice was not provided for this group there was a danger of "incipient anarchism" and thought that the institution of small claims courts might make "justice seem a more real thing to the average man with its resultant beneficial effects on good citizenship and loyalty".²⁴ He also was concerned that the existing system allowed the unscrupulous to take advantage of the honest individual, particularly in the area of credit. Reference to "the poor" in the title of the book was to the "honest wage-earner" rather than the indigent. The demand for this court may be judged by Willard Hurst's comment in *The Growth of American Law* that "most civil business in the first tier of city courts in the twentieth century consisted of wage claims and creditors' claims against wage earners".²⁵

There were several strands in this early movement: access to justice for the ordinary individual, concerns with costs and delays and the importance of the communication of

²¹ There was an unpublished evaluation of claims between \$1,000 and \$3,000 in the Provincial Court (Civil Division) in 1982 see A. Cavoukian and S. McCann *Evaluation Report of the Provincial Court (Civil Division): Empirical Research Findings Relating to Claims Between \$1000 and \$3,000* (1982). Notwithstanding the epithet of "The People's Court" the Civil Justice Review decided not to undertake any empirical study of the operation of the Small Claims Court.

²² Much valuable background for this section may be found in E. Steele, "The Historical Context of Small Claims Courts" (1981) *American Bar Foundation Research Journal* 295.

²³ See Steele above and C. Harrington, *Shadow Justice* (1985)

²⁴ R.H. Smith, *Justice and the Poor* (1919)(Chicago: American Judicature Society, Bulletin 7; reprinted, Chicago: National Legal Aid and Defenders Association, 1967 at 53.

²⁵ James Willard Hurst, *The Growth of American Law: The LawMakers* (1950) at p159.

"American values" of dispute settlement to a heterogeneous urban population. There was a tension between viewing small claims courts as a dumping ground for petty litigation and as important sites of social justice and/or social control. These tensions appear in the celebrated articles of Roscoe Pound who conceived of the courts as providing access to justice, disposing of "petty litigation", and as important sites of social ordering for a highly diverse and unruly urban population.²⁶

(ii) Small Claims Courts as Instruments of Oppression in Debt Collection

The next wave of reform began in the early 1950s, when a growing number of commentators began to draw attention to the deformation of the court into a debt collection agency for "easy credit" operators.²⁷ In their 1975 review of the small claims court literature, Yngvesson and Hennessey point out that much of the literature from the early 50s raised three issues which were developed in subsequent critiques: "heavy use of the court by business plaintiffs; the high proportion of individual [poor] defendants; and the high number of defaults".²⁸ In 1969, Moulton wondered whether the use of small claims courts as collection agencies simply confirmed the belief that the legal system denied justice to the poor and increased their alienation²⁹. These criticisms were mirrored in Canadian documents of the period such as the Mcruer Commission, noted above, and subsequent bans in several jurisdictions of corporate claims, collection agencies and lawyers were partly a response to this literature on the deformation of the court into a collection agency.

(iii) Small Claims Courts and Consumerism

A slightly differing critique focused on the absence of individual consumers as plaintiffs in these courts. Small claims courts became linked to consumerism and the need to provide affordable mechanisms to make consumer rights effective. Much writing of this period combined criticism of the courts as debt-collection agencies with that of the failure of the courts to provide access to justice for grievances of the average individual. A comprehensive analysis of small claims courts across Canada in 1977 indicated that the "principal criticism levelled at the small claims court system is that its main activity has become that of a collection agency...The courts are not a particularly effective method of serving most of the needs of consumers".³⁰

²⁶ See generally R. Pound, "The Administration of Justice in the Modern City" (1913) 62 *Harvard L. Rev.* 302. Pound was concerned that since this was the court which touched "immediately the greatest number of people", it was important that it should command their respect and he proposed "strong judges to whom large powers could be safely entrusted". Some of the themes of social control of an unruly urban population are echoed in the Barlow hearings above.

²⁷ See Note "Small Claims Courts as Collection Agencies" (1952) *Stanford L. Rev.* 237.

²⁸ B. Yngvesson and P. Hennessey, "Small Claims, Complex Disputes: A Review of the Small Claims Literature" (1974-75) *Law and Society Review* 9 219 at 229.

²⁹ Moulton "The Persecution and Intimidation of the Low Income litigant as Performed by the Small Claims Court of California" (1968-69) *Stanford L. Rev.* 1657 at 1669.

³⁰ P. Sigurdson and L. Roine, *Consumer Redress Mechanisms* Consumer Research Council 1977 at 3,1.

There was also growth of interest in locating small claims courts within a larger universe of redress mechanisms, attempting to match the nature of consumer disputes to the appropriate forum. Before it had become fashionable to talk about ADR, writers were describing the possibility of mediation and consumer arbitration and in 1972 the Ontario Law Reform Commission outlined several possibilities for consumer redress including class actions, industry sponsored mediation and the Scandinavian public complaints board.³¹

(iv) Contemporary Trends

While the above concerns remain significant in discussions of small claims courts there are also certain contemporary trends.³² There have been significant increases in the monetary jurisdiction of many small claims courts in the USA and in some Canadian jurisdictions, partly motivated by the hope of reducing pressures on higher courts. Promoting settlement is often endorsed explicitly or implicitly as a desirable aspect of small claims procedures, and varieties of pre-trial mediation have become a common feature of small claims courts in North America. Moreover, given the changes in the economy where there are greater numbers of small businesses and self-employed individuals, there is greater acceptance of the view that the court is a forum for both individuals and small business. In Quebec, for example, small businesses are now permitted to use the small claims court. Introducing amendments to the jurisdiction of the existing small claims court in 1992 the Attorney General of Ontario stated: "We want the people's court to be more accessible for everyone in the province, from the average person with a claim for faulty repairs, to the small business owner trying to collect a bill". At the same time Goerd, in his study of US small claims courts notes that "there is strong sentiment in many small claims jurisdictions that small claims courts should primarily serve individuals".³³ The appropriateness of restrictions on who may use the court is likely to remain a contentious issue.

2. ASSUMPTIONS CONCERNING SMALL CLAIMS COURTS³⁴

All reforms are based on assumptions about the nature of the particular issue under consideration, the role of relevant social institutions and the actors affected by the reform. This is certainly true of small claims courts. While much writing on small claims courts has been atheoretical in failing to locate them within a broader view of the role of law in society, the literature is often premised on certain assumptions. One view has been to analyze small claims courts as part of a scheme of distributive justice. This has two aspects: ordinary individuals should have equal access to similar facilities available to large organizations for exercising their rights, and access to an institution which would allow individuals effective redress against more powerful social actors. These courts could be therefore a part of making effective the new social rights to protection from consumer fraud or arbitrary treatment by landlords or employers: they might make justice "available to the underprivileged who, it is thought, are most likely to be "ripped off" without having the resources and means to seek legal

³¹ Ontario Law Reform Commission, *Report on Consumer Warranties and Guarantees in the Sale of Goods* (1972)

³² See Goerd above at 6,31-33.

³³ Id. at 31.

³⁴ See generally E. Steele, "Historical Context of Small Claims Courts", above, at 357-368.

protection".³⁵ Within this perspective problems addressed by small claims courts are representative of wider social problems such as consumer fraud,³⁶ or the failure of the law to provide equal justice for the working person.

This perspective partly animated the reformers of the progressive movement and reforms in the 60s and 70s.³⁷ There is a further assumption here that without small claims courts there will be an increase in social disorder or oppression with potentially dangerous consequences. If Reginald Heber Smith's pleas for the introduction of small claims courts as a bulwark against anarchism in the 1920s seem far fetched to us, we should note that similar claims concerning the court were made in the 1960s in relation to the poor. The courts are conceived as an important resource in escaping from oppressive social relations and/or shoring up social relations. An example of this position is found in the rich studies by anthropologist Laura Nader of differing forms of consumer redress handling. The findings, appropriately entitled "No Access to Law", were premised on the argument that a failure to provide effective remedies for consumers would lead to an endemic sense of powerlessness in society and a potential breakdown in social order. The book commences as follows:

Little injustices are the greater part of everyday living in a consumption society, and, of course people's attitudes to the law are formed by their encounters with the law or by the absence of encounters when the need arises. If there is no access for those things that matter, then the law becomes irrelevant to its citizens and something else, alternatives to law become all they have.³⁸

There is also the assumption that small claims may not only be just as complex as large monetary claims, but also raise important questions of public policy and reference is made to the fact that such famous cases as *Donoghue v Stevenson* were claims for small amounts of money.

Those subscribing to this distributive perspective are, however, also likely to realize quickly the limits of the small claims court in achieving broad scale redistribution. Such change may be achieved more effectively by providing greater resources to public agencies, introducing class actions or "bright line" rules in the market place. Indeed, reforms to small claims courts by governments may be viewed as a symbolic response to significant social problems. Moreover, there is a growing literature which indicates that individuals, particularly those from disadvantaged groups, may feel far from being empowered by attempts to assert rights in courts.³⁹

The distributive perspective raises important questions in relation to small claims courts. How significant is the court in relation to addressing social injustice? Does it provide an

³⁵ G.D.S. Taylor, "Small Claims in Australia" quoted in Cappelletti and Garth above at 70.

³⁶ See e.g. Sigurdson in *Consumer Redress Mechanisms*.

³⁷ See for example the 1969 article by Moulton where she states that "It is conceded that reforming small claims courts will not end injustice or eradicate poverty. But it is one place to begin...Small Claims courts could become a model for other attempts to make the concept of equal protection and due process of the law fully operative". "Note: The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California" (1968-69) 21 *Stanford L. Rev.* 1657 at 1684.

³⁸ L. Nader, "Alternatives to the American Judicial System" in Nader (ed) *No Access to Law* (1980) and see the thoughtful critique of this book by S. Silbey, "Who Speaks for the Consumer, Nader's *No Access to Law* and Best's *When Consumers Complain* (1984) *American Bar Foundation Research Journal* 429.

³⁹ See e.g. K. Bumiller, *The Civil Rights Society*.

individual with the opportunity to challenge more powerful social actors? To what extent is its distributive role confined to reproducing inequality by allowing the "haves" to come out ahead? Is it worthwhile to attempt to achieve any broad "levelling out" of parties by tinkering with the rules of individual litigation? These are important questions about a state-subsidised service.

There is a different view of small claims. This views them as addressing relatively unimportant claims which are not of significance beyond the parties involved and which should be processed as expeditiously as possible without a large commitment of public resources. Informal alternatives should be encouraged to divert claims from the public system and small claims courts provide a convenient forum for diverting less important (as measured in dollars) cases from the justice system. Paradoxically, those holding this view will recommend the expansion of small claims courts in the hope that this will reduce the perennial problem of delay in the upper courts. One might speculate that this was historically the reason for the continuing increase in division court jurisdiction. Perhaps this has also represented historically the approach of much of the Bar in Ontario to small claims⁴⁰ and is implicit in some of the dispute processing literature which has focused on ADR. Within this perspective individuals may be viewed not as rights-holders but as complainers and disputes conceptualized as being primarily individual problems of communication—the "broken telephone" theory of disputes—rather than raising issues of justice. A focus on the individual dispute as the unit of analysis also tends to shade out broader differences in social structure between litigants and may foster an approach which assumes that mediating an international shipping dispute is a similar process to mediating landlord-tenant issues.

Finally, a more recent perspective on these courts derives from legal pluralism. This draws attention to the fact that we live in multiple and overlapping normative communities: the family, the workplace, the market, and that the law of the state may have only an indirect and marginal impact on dispute solving within these differing institutions. Courts are peripheral rather than central, although their pronouncements may be of significant symbolic impact. This perspective raises questions about claims for the social significance of the court. In addition, the absence of certain groups from the courts does not, of itself, suggest that there is an access problem since there may be other means of solving the dispute. The normative implications of this perspective are not always clear but it should cause lawyers to pause before they assume the centrality of institutions such as small claims courts in the firmament of dispute resolution.

⁴⁰ Early editions of the *Division Court Handbook* by C.F. McKeon (1953) state that "the amounts involved in Division Court actions make it economical to handle such claims only if it can be done without interference with the normal Office routine". A reviewer stated that "the division court is an admirable training ground for students and junior members of the bar". Review, (1954) 32 *Canadian Bar Review* 917.

3. EXISTING SMALL CLAIMS COURT PROCESS

(a) FINANCING OF COURT

The small claims court is not self-financed through fees. It is a subsidised government service. There are several issues which might be raised related to the financing of the court. First, at what level would fees have to be established in order for the court to be self-financing? Second, is there a case for cross-subsidization among users? Frequent corporate users might be charged a differential fee or a fee which was related to the number of cases brought before the court, a practice used in some US states.⁴¹

(b) JURISDICTION OF SMALL CLAIMS COURT

Since 1993 the Small Claims Court has jurisdiction in any action for the payment of money or recovery of property where the value does not exceed \$6000. This limit is established by regulations made under s. 53(1)(c) of the *Courts of Justice Act*. There is no restriction on who may bring an action and both corporations and individuals may file claims in the court. The broad terms of its jurisdiction will cover many actions in contract and tort including defamation, wrongful dismissal, consumer and business claims.⁴²

It is important, however, to note those situations where the court does not have jurisdiction. Landlord/Tenant issues in relation to eviction and repairs are addressed elsewhere, issues of discrimination are under the jurisdiction of the Ontario Human Rights Commission, employment standards are addressed by the Employment Standards tribunal, issues of social security by the Social Assistance Review Board. Unionized employees will take grievances concerning employment to arbitration rather than the courts. Complaints concerning government agencies may be channelled to the Ombudsman who received approximately 31,000 complaints in 1994-95. Many issues associated with the welfare state have bypassed the courts as the primary adjudicator and administrative tribunals may be a more significant dispute settlement mechanism than the courts for the average individual. This obvious but important point is sometimes overlooked in evaluating the small claims court. In addition, many of these tribunals may be more "legalized" than the small claims court and it might be useful to compare the small claims courts process with tribunals rather than the higher courts.

(c) TERRITORIAL JURISDICTION

The rules of venue indicate that an action shall be tried either where the cause of action arose or where the defendant resides. These apparently innocuous rules may work hardship. Businesses may designate in their standard form contracts that the City of Toronto is the place of payment. The cause of action will arise in Toronto, and this may work injustice to an individual who lives in Muskoka and is probably unaware that she may make a motion to have the jurisdiction moved to her home community. My understanding is that this is not a hypothetical problem and that the large distances which individual defendants must travel in some cases contributes to the large number of default judgments in small claims courts.

⁴¹ See Goerdt above at 6-12.

⁴² See s. 23 *Courts of Justice Act*, R.S.O. 1990, c. C 43 as amended.

(d) FEES

There is a fee of \$35 for filing and \$20 for serving a small claim under \$1000, \$50.00 and \$20 for claims over \$1000, and no fee for filing a defense. The court carries out service of the documents unless the plaintiff is represented by a solicitor. The court serves the claim on behalf of the plaintiff.

(e) PROCESS: PRE-TRIAL: ADJUDICATION

If a claim is defended then in many areas of Ontario there will be a pre-trial hearing, which is heard before a referee (a court employee), a part-time judge or a judge. If there is a trial then the vast majority of trials will be before deputy judges. These are not full-time judges but lawyers appointed by the regional senior judge with the approval of the Attorney General.⁴³ There are approximately 380 of these judges who sit approximately one day each month. They may be appointed for up to a three year, renewable, term. They are paid a per diem rate of \$235. There are no province-wide guidelines or criteria for appointment, no measures to train or evaluate their performance and no guidelines on conflicts of interest.

(f) COSTS

Costs are limited generally to 15 percent of the amount claimed.⁴⁴ There are limited possibilities for night sittings for cases under \$500 in Toronto which could reduce litigants costs through lost wages. The court may provide and pay for a court interpreter for a French language trial. For other languages the parties have to bring their own interpreter.

(g) ENFORCEMENT OF JUDGMENTS

Judgments obtained in the small claims court may be enforced by the small claims court bailiff. The most common means of enforcement is the use of garnishment orders, but seizure of personal property is used in a minority of cases. Where a judgment remains unpaid creditors may request an examination hearing of the debtor concerning the reason for non-payment and the debtor's ability to satisfy the judgment. This is an increasingly common form of enforcement activity.

4. SOCIAL SCIENCE EVIDENCE AND SMALL CLAIMS COURTS

Social science research has played a significant role in debates on the role of small claims courts. For example, in the 60s and 70s data on domination of these courts by the business of debt-collection and the apparent non-use by consumers had an important "shock value" and animated specific reforms such as the banning of corporations and collection agencies using the courts.

The studies of the late 60s and early 70s could be classified as classic "gap"⁴⁵ studies, drawing attention to the gap between the legal image of equality before the law and the apparent domination of these courts by "the have" repeat-players. It was perhaps assumed that

⁴³ S. 32(1) *Courts of Justice Act*.

⁴⁴ S. 29 *Courts of Justice Act*.

⁴⁵ See R. Abel, "Law Books and Books About Law" (1973) 26 *Stanford L. Rev.* 175.

it would not be a difficult task to close the gap and develop a court which provided justice for the ordinary individual. The issues and perspectives in these studies became the focus for later studies which probed the validity of the conclusions drawn from the earlier studies.⁴⁶ Later work of the 70s and early 80s was influenced by a disputing perspective which focused on the appropriateness of differing forms of dispute settlement such as mediation, arbitration and adjudication in addressing differing types of disputes and in achieving compliance with judgments. This focus probed also the role of the court within the community. More recently, there has also been greater interest in the demographics of users and non-users of these courts, and some rich ethnographic studies of the discourse of small claims courts and the relationship of this legal voice to the concerns and discourse of individuals bringing claims before the courts.⁴⁷

In the following survey of social science research on small claims courts I have drawn primarily on existing studies of Ontario small claims courts,⁴⁸ analyses from other Canadian jurisdictions, and US studies. The primary studies referred to are outlined in Appendix 1. There are the usual caveats. There are difficulties with drawing straightforward policy conclusions from data. Studies use differing methods of coding. In some studies, "business" is the category for all business claims, in others it is broken down into large and small business. It may be dangerous to assume that the designation as plaintiff reflects the real roles of the parties since consumers often initiate action for defective products or services by withholding payment. Although nominally defendants they may, as we shall see below, effectively win the case even though judgment is awarded against them. Measuring "satisfaction", a common form of question in governmental evaluations, is fraught with difficulty. What people are satisfied with is partly dependent on their existing knowledge of their rights and what they believe is possible, which is affected by the existing system of redress opportunities. "Compared to what" might be the appropriate answer in many cases.⁴⁹ The process of disputing may well have an influence on satisfaction since evidence suggests that lawyers often "cool out" clients and lower their horizons by explaining the reality of the legal system.

One influential commentator has argued that the articulation of public values rather than consumer satisfaction is the goal of civil litigation and "satisfaction" is therefore an invalid measure of success.⁵⁰ Even assuming the importance of measuring customer satisfaction, there is a danger that too much weight will be given to statistical data on satisfaction rather than more qualitative assessments of the quality of justice of particular disputing mechanisms. Finally, the concepts used in empirical analysis, such as "dispute resolution", may contain controversial assumptions such as the idea that conflict is bad, that effectiveness is measured

⁴⁶ See e.g. Ruhnka and Weller (1978) above.

⁴⁷ See e.g. J. Conley and W. O' Barr *Rules Versus Relationships: The Ethnography of Legal Discourse* University of Chicago Press, 1990.

⁴⁸ These include Vidmar, the pilot study by Hildebrand et al, McIntyre, Moldaver and Herlihy, Sigurdson, Cavoukian, the Canadian Bar Association pilot mediation study, Finkle and Cohen, the British Columbia study, Ramsay. For full citation see Appendix 1.

⁴⁹ For a catalogue of problems facing researchers in this area see J. Esser, "Evaluations of Dispute Processing: We do not know what we think and we do not think what we know" (1988-89) 66 *Denver U.I. Rev.* 499.

⁵⁰ See O. Fiss, "Against Settlement" (1984) 93 *Yale L.J.* 1073.

by disputes settled, and the image of society as a pressure-cooker of disputes which needs to be prevented from boiling over.

It may be useful to begin with some general data on claims filed in Ontario small claims courts. In 1993-94, 134,709 claims were filed in small claims courts in Ontario. There are no accurate official statistics on the percentage of cases which are disposed of by default judgment and at trial. Studies by Cavoukian (1982) and Vidmar (1980) indicate a default judgment rate of 65% and 54% respectively and a trial or pre-trial occurring in 22% and 21% respectively. One initial point is therefore the relatively high number of cases, compared with the higher courts, which result in a hearing. The reasons for this phenomenon may include the lower financial incentives to settle, coupled with the greater uncertainty as to judicial decision making in the small claims courts and the lower involvement of lawyers who might act as a reality check to their clients and counsel settlement.

(a) TYPE OF CASE BROUGHT BEFORE THE SMALL CLAIMS COURT

The majority of actions in small claims courts are debt actions brought by businesses against individuals. In those courts where corporations may not sue, such as Quebec, it would appear that debt collection by unincorporated businesses and professionals continues to represent the majority of cases.⁵¹ There are also significant numbers of cases between businesses.⁵² Apart from debt claims, the balance of the caseload consists of landlord actions for arrears of rent, consumer claims, tort actions, and employment actions.

Many studies of the 60s and 70s indicated that consumer claims, defined as individuals bringing a consumer claim against a business, made up a small percentage of the total claims filed with the court, perhaps at most 10% of disputed cases.⁵³ It became almost a part of conventional wisdom to view the small claims courts as a court "colonized" by business repeat-players suing individuals for debt.⁵⁴ The court appeared to have failed in its promise to provide consumers and other individuals with an accessible forum for redress, seemingly confirming the McRuer Commission's conclusion that it functioned as a "statutory collection system".

Vidmar challenged these findings in a study of the small claims court in Middlesex County drawing data from cases in 1980.⁵⁵ His study is the only major published study of an Ontario Small Claims court [Hildebrandt *et al* is described as an exploratory study]. His data indicated that of the total number of claims filed (Sample size 2079) 25% never proceeded beyond filing a statement of claim, 54% resulted in a default judgment and 21% of cases were contested. Of the default judgment cases, 75% were by a business against a consumer and 16% a business against a business. Of disputed cases, 22% were a business versus an individual, 11% a

⁵¹ See study of Montreal Small Claims Court by McGuire and Macdonald, (1996) and Sigurdson, (1977).

⁵² See Sigurdson, at 106, Ramsay, at 28.

⁵³ See e.g. Ramsay "Small Claims Courts in Canada" in C. Whelan (ed.) *Small Claims Courts: A Comparative Study* (1990) at 29-30, noting these studies.

⁵⁴ Hildebrandt *et al* at 117 comment that the Court is dominated by repeat-player plaintiffs "more likely than not to be pursuing claims related to their business interests".

⁵⁵ See N. Vidmar, "The Small Claims Court: A Reconceptualization of Disputes and an Empirical Investigation" (1984) 18 *Law and Society Review* 515.

consumer versus a business, 27% a business versus a business and 12% an individual versus an individual. The median amount claimed in the default case was \$279.

Vidmar argued that previous research had underestimated the number of consumer cases because they had only counted as consumer cases those situations where a consumer appeared as plaintiff. When cases where a consumer defended by withholding payment are added, consumer cases comprised 33% of all disputed cases. In addition, he introduced the concept of "partial liability". He argued that a typical situation was where a consumer withholds payment for renovations because of dissatisfaction with some aspect of performance. The consumer is willing to pay a percentage of the bill but not the total bill. At trial the plaintiff might not recover the total amount, possibly the amount which the consumer was willing to pay. Judgment will be recorded for the plaintiff, therefore inviting coding as "plaintiff win", but the plaintiff may have lost, if her claim was for \$900, and the defendant had been willing to pay \$600 and judgment was given for \$600. The judgment would be a vindication of the rights of the defendant consumer.

Vidmar drew a picture of the typical consumer case:

Consider some cases where the consumer was the defendant. A service station claimed for car repairs; the defendant argued that she had been overcharged on labor...A real estate firm claimed for a brokerage fee, but the consumer said the plaintiff had failed to provide the service...a tile company sued for an unpaid account, but the defendant asserted that the work was inferior and that in addition the final account exceeded the original estimate...Consider cases where the consumer was plaintiff...The plaintiff's boat was destroyed when wind blew down the defendant bailees shed...A consumer had a new roof installed and paid upon completion, but when it rained the roof leaked; the roofer asserted that the water damage had occurred before repairs were made...the underlying nature of the disputes was similar.⁵⁶

He concluded that in disputed cases individuals seemed to succeed as often as business whether as plaintiffs or defendants,⁵⁷ business plaintiffs in disputed cases tended to be small business and although businesses were more likely to be repeat players and be represented by lawyers, there was no association between these factors and dispute outcomes.

Vidmar's study underlines a distinction which may be drawn between the two major businesses of the court; debt-collection resulting in default judgment and disputed cases before the court. Unfortunately, his study did not investigate in any detail the default judgment cases, or the demographic characteristics of those using the court. Having noted that limitation, his analysis does provide us with some pause before drawing a blanket conclusion that the small claims court is solely a tool for the "haves".

(b) DEMOGRAPHIC PROFILE OF USERS

Studies of small claims courts have tended to focus on the demographics and experiences of plaintiffs. Existing studies in Canada, the US, and elsewhere indicate that it is middle income, better educated, male, individuals who bring cases as plaintiffs in small claims courts⁵⁸.

⁵⁶ Id. at 532.

⁵⁷ It is possible that his findings on the relative success of business and consumer plaintiffs were related to the fact that consumers are likely to bring stronger cases (in which case they in fact did worse than business).

⁵⁸ For example, Best *et. al.* in the Denver study(1994) at 356, "The study revealed that middle aged, middle income Whites dominated the court room". Hildebrandt *et al* found that 77% of plaintiffs described themselves as engaged

Studies of the court have often obtained small and unreliable samples of defendants, or simply neglected to study defendants, in particular those who were involved in default actions.⁵⁹ This is of policy significance since defendants and default defendants are also users of the court and by finding out more about their circumstances and their reasons for default we might learn about the role of the court process in the process of debt collection.

In order to gain some insight into the demographics of default judgment defendants we can turn to studies which have looked at the court process as part of a study of debt collection. These provide some data to fill the gaps in the court studies. The profile of an individual taken to judgment for debt indicate that the majority are in blue-collar occupations, have lower than average incomes, have less post-secondary education than the general population and rent rather than own.⁶⁰ Most have been unable to pay the debt because of a change in life circumstances such as unemployment or the loss of a partner's income.

It might be hypothesized that there are class differences between differing "users" of the court. The majority of those involved in disputed cases may be drawn more from the ranks of the middle class. Those who are defendants in default judgment cases may however be drawn more from the working class and those in more precarious economic positions in our society. This latter category may overlap with issues of gender and race, given that statistical data indicate the precarious position of single parent families headed by women and the likelihood that lower income and new immigrant groups are often the targets of fraudulent selling practices. This hypothesis gains strength from the consultations carried out for the Civil Justice Review. There was a significant distinction between differing groups' perception of satisfaction with the small claims court. Business groups and middle class consumer groups thought that

in business or professional activities, whereas only 10% of the Windsor population were engaged in these activities. McGuire and Macdonald,(1996a) in their study of a Montreal Small Claims court conclude that "The bulk of the court's clientele are men as opposed to women, professionals and/or business people as opposed to consumers, the well educated as opposed to the poor, the European as opposed to the ethnic minority". Ruhnka and Weller comment at p.52 that "Overall we see that the small claims litigants who responded to our questionnaire were predominantly well educated and middle income, with a fairly representative racial mix. Again we should point out that these data do not necessarily represent the mix of the population of litigants who use the courts, and especially the population of defendants".

In the lay litigant survey in the British Columbia study (Adams *et al.*) 69% were plaintiffs and 31% were defendants. Of this sample, 78% were between 31 and 65 and 71% had gone on to further education after high school. "Three quarters of them had completed High School, most are English speaking and born in Canada, and most are over thirty years of age. Surprisingly, over half thought themselves to be aware of the Small Claims process before acquiring the information they received at the time of their case, and just over a third had previous court experience" at 28. Hildebrandt et al. noted that two-thirds of plaintiffs had prior experience of the court.

⁵⁹ Vidmar did not interview individual defendants in default judgment cases, which comprised 54% of the caseload. McGuire and MacDonald in their recent study of the Montreal Small Claims Court, base their conclusions primarily on a sample of plaintiffs.

⁶⁰ The starting point for analysis here is David Caplovitz (1974) in *Consumers in Trouble: Debtors in Default* at 24 where he describes individuals who default on debt as having "lower occupational status, to be more poorly educated, and to be relatively younger than the general population." In addition, members of minority groups, blacks and Puerto Ricans, were represented to a far greater extent than would have been expected based on their general percentage in the population. T. Puckett in a study of wage garnishment in Ontario drawn from 1975 court records indicated that "only a small portion of debtors had post-high-school education, that the majority were employed in blue-collar occupations, that the vast majority were renters, and that the majority reported a family income of \$12,000 or less." T. C. Puckett, "Credit Casualties: Wage Garnishment in Ontario" (1978) 28 *University of Toronto Law Journal* 95 at 106. Studies elsewhere paint a similar picture. The literature is reviewed in I. Ramsay (ed.) *Debtors and Creditors: A Socio-Legal Perspective* (1986).

the existing court system was satisfactory, while poverty groups indicated that courts were intimidating for their clients and that reforms such as full time inquisitorial judges and a duty counsel would make small claims more effective for the poor. Minority groups were concerned about language barriers, judges lack of knowledge of the problems faced by minority groups and a general lack of confidence of minority groups in the civil justice system.

(c) PACE OF LITIGATION IN SMALL CLAIMS COURTS

A major reason for the establishment of small claims courts was to provide expeditious justice. There are no reliable province-wide data on this issue in Ontario. In Toronto, information provided to me indicates that the average time period from a defence being filed to a trial or pre-trial for cases over \$1000 was four months. For cases under \$500 which are held in Night Court the average time is three months. The time from filing a claim to a defence being filed is normally about eight weeks. I understand that there is sometimes a delay in service of claims given the resource constraints of the court. Thus, the period from filing to pre-trial in a disputed claim may be approximately 6 months. I understand that this is an improvement over recent years when the waiting time in Toronto could be over a year.

In the recent review of US small claims courts, Goerdts indicated that the average mean time from filing a claim to judgment was 63 days. In addition, he conducted a survey of litigants which indicated that many thought that an eight week waiting period was about right.⁶¹

(d) REPRESENTATION BY LAWYERS AND AGENTS

Arguments for the introduction of small claims courts were premised on the assumption that the procedure in these courts should be sufficiently simple that legal representation would not be necessary.⁶² The absence of lawyers would reduce costs, and permit the court to focus on the substantive justice of the issues rather than engage in the procedural niceties associated with legal argument. Most Canadian provinces permit legal representation and only Quebec and Nova Scotia currently ban legal representation in the small claims court. Lawyers are not permitted at trial in a significant number of US jurisdictions. In Goerdts's survey of 12 small claims courts in 1992, seven did not allow representation by lawyers or collection agents.

It would appear that, notwithstanding the ideal of non-representation, significant percentages of litigants in disputed cases consult lawyers or paralegals at some stage of a small claims case and that this percentage increases as the dollar value of the claim rises. Empirical evidence from a number of studies indicates that in disputed cases in the small claims court 40-50% of litigants are represented by lawyers or agents at trial.⁶³ It should also be noted that

⁶¹ Goerdts, above at 83. He notes that the American Bar Association recommend a model disposition time of 30 days.

⁶² See e.g. R. Pound, "The Administration of Justice in the Modern City" (1913) 62 *Harvard L. Rev.* 302 at 318-319 "It is a denial of justice in small claims to drive litigants to employ lawyers, and it is a shame to drive them to legal aid societies to get as a charity what the state should give as a right...In petty causes there ought to be no expensive advocacy". Reginald Heber Smith stressed that "a cardinal principle in small claims court reform ought to be that proceedings are conducted without lawyers".

⁶³ Vidmar found that in disputed cases plaintiffs had an agent (usually either lawyer or collection agency) over 50 percent of the time and defendants in disputed cases had an agent in about 40 percent of cases. In the recent British Columbia evaluation, statistics indicated that in 52% of cases going to trial one party was represented by a lawyer or collection agent. Hildebrandt *et al* in contrast indicated (at 107) the use of lawyers in only 22% of cases.

legal aid is not generally available for small claims actions and that few legal clinics in Ontario undertake small claims litigation.

(i) Impact of legal representation

A more difficult question to assess is the impact of legal representation on success. Ruhnka and Weller found that there was a bias against unrepresented defendants. These individuals did equally poorly whether they were facing a represented or unrepresented plaintiff.⁶⁴ Representation by a lawyer did not seem to affect plaintiff's chances of success. Hildebrandt *et al* found that the unrepresented first-time plaintiff had greater success than the represented plaintiff.⁶⁵ Vidmar found no association between legal representation and dispute outcomes.

The use of a lawyer, agent or paralegal will increase the costs of a litigant. Ruhnka and Weller concluded that where lawyers were used costs as a percentage of the claim increased significantly. At the same time they found significant percentages of individuals reporting that they received advice from lawyers at no cost.⁶⁶ The presence of lawyers in the small claims court may also raise the level of formality within the court, undermining the idea of informality and also the ability of individuals to "tell their story" without framing it in legal language. It may also allow the court to appear similar to the higher courts, maintaining the adversary system and the relatively passive role of the judge.

(e) SMALL CLAIMS COURT ADJUDICATORS

One of the assumptions of much small claims literature has been that there should be an activist judge and this is sometimes recognized in statutory provisions.⁶⁷ The Ontario Small Claims Court Handbook indicates that some judges are inquisitorial and control the proceedings, partly to "speed up trials" and enable "the judge to skip over or to cut short rambling or extraneous testimony" and to "take the burden off inexperienced litigants." Others view the court hearing as performing an important therapeutic role, allowing parties their day in court and an opportunity to tell their story to an authority figure.⁶⁸ In Quebec, McGuire and Macdonald found that judges did not relish an inquisitorial role, perhaps confirming Cohen and Finkle's conclusion that activist judges "willing to probe to the roots of dispute in order to achieve voluntary settlement, are theoretically possible, though they are unlikely to emerge from the current Canadian legal culture".⁶⁹

In a study of fourteen small claims court judges in the U.S., Conley and O'Barr found a remarkable variety of judicial approaches to small claims, identifying five contrasting

⁶⁴ See Ruhnka and Weller at 69.

⁶⁵ Success was defined in the study as amount collected as percentage of amount claimed. Is it possible that unrepresented litigants were more unrealistic in their claims? Hildebrandt *et al* argue that their findings seemed to confirm their discussions with lawyers in Windsor where over a third of those surveyed believed that the small claims court is biased against lawyers. Hildebrandt *et al* at 109.

⁶⁶ Ruhnka and Weller at 82-83.

⁶⁷ For example, in the relevant sections of the Quebec Code of Civil Procedure addressing small claims.

⁶⁸ M. Zuker *Ontario Small Claims Court Practice* (1995) at 26.

⁶⁹ P. Finkle and D. Cohen, (1993) at 104.

approaches. These were: the strict adherent to the law; the lawmaker; the authoritative judge; the mediator; and the proceduralist.⁷⁰ In recent research on small claims court judges in the UK, Baldwin used slightly different categories: “going for the jugular” (identifying the central issues at an early stage and sticking to them); “hearing the parties” (allowing the parties greater latitude to develop their arguments in their own way); “passive” (talking to each of the parties like a solicitor interviewing clients); and “mediatory” (encouraging the parties to agree to their own solution).⁷¹

Anecdotal evidence of this diversity of approach in Ontario may be found in a recent journal article concerning an Ottawa small claims court judge. In some cases he described his approach as “going for the jugular”: “I’m a guy who likes to get on with the issues”. In others he acted as a background mediator:

I’ve looked at these documents and I’ll make the hard decision if I have to. But I’d ask you to put your heads together first. A solution can be arrived at. If you’re reasonable, if you both take a reasonable approach, this could be resolved easily.

In another case he acted as a lawmaker overruling technical rules of civil procedure.⁷²

The striking conclusion from these studies is the diversity of judicial approaches in small claims courts, once again illustrating the difference between the ideal of the neutral, impartial judge applying the rule of law and the particularistic application of the law at the “street level” with different patterns of justice dependent on judicial perception of the role of the law and “the needs” of litigants. Since significant numbers of litigants are unrepresented, there is less control over this exercise of judicial power.

One of the continuities in small claims adjudication in Canada has been the large role played by part-time judges and to a lesser extent by lay judges. This has also been a major development in small claims courts in the USA. In 1978 Ruhnka and Weller noted that 14 of the 15 courts studied employed full-time judges. In 1990, 9 of the 12 courts studied employed part time justices or full time court employees to hear cases.⁷³ Lay justice has historically been a significant part of the legal system reflecting often what Dawson described as a “driving need to economize on the time of professional judges”.⁷⁴ The Justice of the Peace is the best known example in the Anglo Canadian system and in Ontario, JPs still make decisions on bail in criminal cases. Referees of the small claims courts conduct pre-trial hearings, which for many litigants in disputed cases may be their day in court. Although these are not technically adjudications, the referee may well be perceived by some litigants as similar to a judge and will often be able to influence the outcome. Vidmar noted that referees “frequently assumed a quasi-judicial role” and allowed unrepresented parties to assume that [s]he was a judge.⁷⁵

⁷⁰ J Conley and W. O’Barr, *Rules versus Relationships The Ethnography of Legal Discourse* (1990) at 82.

⁷¹ Reported in *Access to Justice: Interim Report to the Lord Chancellor on the civil justice system in England and Wales* (1995) by the Right Honourable the Lord Wolf at 107-108.

⁷² See “Staying on Track in the People’s Court” in *The National* July 1995 at 25.

⁷³ See Goerdts at 6, 18.

⁷⁴ J. Dawson, *A History of Lay Justice* (1960) at 293.

⁷⁵ Vidmar at note 22 p 547.

The use of deputy judges has long been a practice in Ontario. The reasons for their use are to reduce costs and it is probably the case that many general division judges would be unwilling to handle small claims court cases. There are several critics of this practice of part-time justice. The Mcruer Commission was very critical of the use of deputy judges and Peter Russell recently described small claims courts as "shadowy tribunals presided over by moon-lighting part-time judges"⁷⁶ symbolizing, for him, the persisting casualness and indifference of official interest in this court.

There is no firm basis at present for evaluating the performance of deputy judges. Criticism of the lack of consistency might simply mean that they are not following the existing routine of the court. It is not clear that lack of consistency is a universal evil in small claims adjudication. There must be concern expressed however at the existing manner of appointment and methods of ensuring quality control. There appears to be little screening of their appointments. A candidate applies to the relevant senior judge (there is no application form as far as I am aware) and s/he recommends to the Ministry of the Attorney General which checks the police files and then confirms the appointment. There is a practice to appoint those with ten or more years experience but this is not a requirement. During the past decade there have been many developments in the selection and training of judges but these seem to have not been applied to deputy judges. Moreover, a quick perusal of the current list of approximately 380 judges indicates an enormous gender imbalance, the vast majority being males.

There are also potential conflicts of interest. Most practitioners represent corporate or small business clients and will rarely encounter consumer claims, consumers, or the relevant consumer legislation in their practices. A US study found that many lawyers lack knowledge of consumer law and are uninterested and unsympathetic to consumer claims.⁷⁷ Deputy judges are being asked to momentarily (perhaps once or twice a month) step out of the shoes of the business adviser to play a different role. This is not the same as a permanent judge who leaves behind forever the baggage of her practice.

(f) THE ROLE OF MEDIATION/PRE TRIAL CONFERENCES

There has been a large growth in mediation of many differing types of disputes. Small claims courts have tracked this growth and most small claims courts in Canada have some form of mandatory or voluntary mediation. In the US, the National Center for State Courts has reported a large growth during the 80s in mediation in US small claims courts,⁷⁸ and the European Commission Green Paper on Access to Justice indicates that conciliation is an integral aspect of small claims procedures in the EU.⁷⁹

The rationale for the growth of mediation in small claims courts in the USA is attributed to three factors: a possible reduction in costs and delays, since many programs use volunteer mediators; a belief that the more informal atmosphere of mediation would offset the advantages of the repeat player user and lead to a higher quality outcome than adjudication,

⁷⁶ See P. Russell, "The Politics of Civil Justice Reform in Ontario" in Ontario Law Reform Commission, *Study Paper on Prospects for Civil Justice* at 255.

⁷⁷ See S. Macaulay, (1979) "Lawyers and Consumer Protection Laws" 14 *Law and Society Review* 115.

⁷⁸ See Goerdt (1992) Part IV.

⁷⁹ Green Paper at 55.

and the possibility of achieving greater compliance with any agreement reached between the parties.⁸⁰

Mediation ranges from the go-between to thinly disguised coercion of parties to reach a settlement. As an ideal type several contrasts are drawn between mediation and adjudication. Mediation is viewed as a process based on consent rather than coercion, taking account of a wider range of factors than merely legal rules, providing an opportunity for compromise rather than the all-or-nothing of adjudication, avoiding apportioning blame and resulting in better quality outcomes. Individuals may feel that they have had greater input and control over a mediated rather than an adjudicated settlement.

Studies of mediation now suggest that we should be hesitant in accepting many of the strong claims made for mediation and its supposed distinctions from adjudication. Susan Silbey in "The Myths of Mediation"⁸¹ argues that many of the arguments put forward by the proponents of mediation are false. For example, the argument that mediation responds to the individual needs of the parties is contradicted by much evidence that it is a routinized, repetitive process. Mediators are not neutral. They may affect the way in which the parties view the legitimacy and morality of their claim by the manner in which they structure the discussion between the parties. Participation in mediation is often not truly voluntary. Certainly that is often true for the Ontario pre-trial hearing. Mediators will often have significant power and although, in the ideal model, cannot impose a settlement, may often shape outcomes by drawing on claims to authority or perceived knowledge about the alternatives to settlement.

In Ontario, mediation takes place in the context of the pre-trial conference. Rule 14 of the small claims court rules states that its purposes are to resolve or narrow the issues; expedite disposition of the action; facilitate settlement; assist the parties in effective preparation for trial; and provide for full disclosure. Although this indicates that the purposes are broader than merely achieving settlement, the conference fits the model of a mediator who has no power to impose a settlement. However, the Small Claims Court Handbook describes the process as "forced bargaining" and notes that "pretrial conferences do prove to be of great value and often result in a settlement".⁸² The average time for a hearing is approximately 30 minutes.

In the path-breaking study of mediation in a small claims court in Maine, McEwen and Maiman concluded that mediated cases were more likely to result in a compromise outcome, lead to greater compliance (defendants who owed money were twice as likely to pay as defendants in adjudicated cases) and result in greater satisfaction and sense of fairness with the mediated outcome.⁸³ Vidmar reached differing conclusions in his study arguing that many of the compromise solutions reflected the nature of the amount in dispute (i.e. the defendant admitted partial liability) rather than the impact of the process.⁸⁴ Vidmar also found no correlation between litigant satisfaction and whether a case was mediated or adjudicated. His

⁸⁰ See Goerdt (1992) at 24-25. Raitt et al "The Use of Mediation in Small Claims Courts" (1993) 9 *Ohio State Journal on Dispute Resolution* 55.

⁸¹ S. Silbey, "Mediation Mythology" (1993) 9 *Negotiation Journal* 349.

⁸² M. Zuker, *Small Claims Court Practice* (1995) at 227.

⁸³ C. McEwen and R. Maiman, "Mediation in Small Claims Court: Achieving compliance through consent" (1984) 18 *Law and Society Review* 11.

⁸⁴ Vidmar, "An Assessment of Mediation in a Small Claims Court" (1985) *Journal of Social Issues* 127.

explanation was that the hearing was often much less consensual than one might expect from the model of mediation. Referees often pressured the parties to settle, either by confirming one party's story or by alluding to the high costs of a lengthy trial. Inexperienced litigants were sometimes under the impression that the referee was a judge. He concluded by wondering whether the pre-trial hearings really qualified as mediation since it was legalistic rather than conciliatory and "since many settlements are subtly and not so subtly coerced".⁸⁵ He agreed in part with the conclusions of McEwn and Maiman on superior compliance from mediation, although he also attributed this partly to the nature of the case.

In a recent, carefully controlled study, Wissler analyzed the relative effectiveness of mediation and adjudication in the small claims division of four courts in the metropolitan Boston area. The mediators were law students, graduate students and other members of the community, all of whom had been trained by the Harvard Mediation program. The author concluded that mediated outcomes were perceived as fairer and participants showed greater satisfaction with the process than with adjudication. Mediated cases resulted however only in marginally greater compliance.⁸⁶

The introduction of mediation is often justified in terms of cost reductions, including within this factor such issues as delay and expense. Studies of courts which use volunteer mediators (in some cases retired lawyers, in others, lawyers, law students, or retired businesspersons) indicated that they saved substantial judicial time and allowed earlier trial dates.⁸⁷ In British Columbia, however, settlement conferences are heard by judges. The introduction of these conferences coincided with an increase in monetary jurisdiction so that it was difficult to assess the independent impact of the settlement conference on costs and delay. Substantial judicial time is now invested in these conferences and, although there are substantially fewer trials, there is significant delay in obtaining a trial. As of January 1995, approximately 50% of courts reported a waiting time of 12 months or more to the next available trial date.

One should be cautious, I believe, in generalizations concerning the role of mediation in small claims courts. The exact nature of mediation and the role and qualifications of the mediators may vary between courts and there may be less distinction between the processes of adjudication and mediation in small claims courts than in higher courts. For example, the British Columbia "settlement conference" is a hybrid mediation/arbitration and in both BC and Ontario the process is more legalistic than the model of mediation which urges parties to focus on their relationship and the underlying issues in the dispute.

There is need for careful analysis of these hearings in terms of the fairness of the process and outcome, particularly as perceived by differing demographic groups⁸⁸ and especially for one-shotter litigants with limited information on the alternatives available. There is a danger that individuals without full knowledge of the implications of alternative courses of action, are shunted into mediation by court personnel. Several criteria might be suggested for judging these initiatives. They include (1) participant satisfaction as to the fairness of the process and

⁸⁵ Id. at 143.

⁸⁶ See R. L. Wissler, "Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics" (1995) 29 *Law and Society Review* 323.

⁸⁷ See J. Goerdt at 104-105.

⁸⁸ See e.g. discussion in M. Fix and D. Harter, *Hard Cases, Vulnerable People: An Analysis of Mediation Programs at the Multi Door Courthouse of the Superior Court of D.C.* (1992)

outcome:(2) cost reductions to the parties and the court:(3) superior qualities of outcome in terms of achieving compliance and personal transformation (ideas of empowerment or reconciliation) (4) impact on settlement bargaining and more general effects on behaviour (5) the quality of justice, in terms of such issues as the loss of precedents and the danger that rights are watered-down in mediation. It should be stated that there are significant technical and theoretical difficulties in measuring these criteria⁸⁹ which may partly account for the continuing controversy over the value of mediation.

(g) THE ROLE OF CLERKS AND THE COURT IN PRE TRIAL ADVICE

Most jurisdictions, including Ontario, provide guides for users of the small claims court. Clerks may not provide litigants with legal advice. The small claims manual of administration states that "the clerk has a duty to assist the public through the court process. This does not mean giving out legal advice. It does mean explaining procedures, advising as to correct procedures and assisting the public competently and efficiently". The difficulties inherent in this statement are implicitly recognized in the commentary to this quotation where it is stated that their advice may "extend in some cases to legal or evidentiary aspects of preparing cases".

I suspect that the role of the counter clerk can be very significant in relation to lay plaintiffs and defendants. Studies of small claims courts in Canada have not attempted to investigate this issue beyond asking whether litigants found the counter staff helpful and certainly many litigants answer affirmatively. However, one factor which contributed to Ruhnka and Weller's conclusion that defendants were disadvantaged in small claims courts was that advice in courts appeared to be structured towards the provision of advice to plaintiffs rather than defendants. In Ontario, an experimental scheme in 1982 used an articling student as a source of advice in the Scarborough Small Claims Court⁹⁰ and in Quebec, court-provided paralegal advice is available. California requires a small claims advisor be made available to litigants in small claims courts.

(h) ENFORCEMENT OF JUDGMENTS

Success in achieving a favourable judgment does not ensure that a plaintiff will be successful in enforcing their judgment. Criticism of the collection process is not new, and it is a recurring theme in studies of the small claims court. It is important to differentiate the issues here. First, individuals and "one shotter" plaintiffs in the small claims courts are often disappointed by the complexities and costs of enforcement and the fact that the court will not enforce the judgment on their behalf. Individuals may face difficulties in enforcing judgments against small businesses where the corporation is a mere shell, and it is difficult to trace assets. This raises issues concerning the abuse of the corporate form and it is not clear how significant would be changes in the forms of creditors remedies to this issue. There is however one method which may aid enforcement. Many businesses in Ontario must be licensed (e.g. auto dealers, itinerant sellers, travel agents, funeral directors). Individuals should be encouraged to notify the Ministry of Consumer and Commercial Relations when businesses do not honour court judgments against them. There already exists a model here, The Motor Vehicle Dealer

⁸⁹ Some of these are explored in M. Galanter and M. Cahill "Most Cases Settle": Judicial Promotion and Regulation of Settlements" (1994) *Stanford L. Rev.* 1339 at 1350.

⁹⁰ See D. Ram, *Report on the Scarborough Small Claims court project: legal counselling experiment*.

Compensation Fund established under the Ontario *Motor Vehicle Dealers Act*. The most common claim currently is for the return of deposits but consumers may make claims for unsatisfied court judgments. Table 1 indicates the recent caseload of the fund.

Table 1

| Year | Claims Received | Claims Allowed | Total Dollar Value | Average Dollar Value |
|---------|-----------------|----------------|--------------------|----------------------|
| 1992-93 | 55 | 69 | \$130,532.30 | \$1,891.77 |
| 1993-94 | 83 | 38 | \$131,947 | \$3,472.29 |

[Note: the most common claim was for the return of deposit money]

Second, there is the issue of individual debtors who are often unable to pay immediately, generally because of a change in circumstances since incurring the debt. It would appear from the civil justice statistical data that there has been a large increase in the use of examination hearings of debtors, which are available where a debtor is in default of payment. In 1993/94 there were 20,570 hearings, almost as many as the number of trials. The examination hearing in small claims courts appears to have become a focus for arranging repayment terms. I have been informed that these hearings are often extremely short (approximately five minutes) and often provide the focus for bargaining "in the halls" between creditor and debtor with the court simply rubber stamping the agreement. The hearing is preceded by a notice to the debtor to attend the court, with a prominent statement that the debtor may be imprisoned if they do not attend. Undoubtedly the hearing addresses the central issue of repayment but one might raise the appropriateness of the threat of incarceration as a background to the hearing and whether such hearings provide a real opportunity for fair bargaining. If a debtor fails to attend an examination and the court is satisfied that the failure to attend is wilful or the debtor attends and refuses to answer questions then a warrant of committal to prison for a period not exceeding 40 days may be made. These are in practice issued after the second failure to attend. There are no reliable statistics on the number of warrants of committal issued or implemented. I have been informed that very few individuals are incarcerated and that, in any event, imprisonment is for contempt of court rather than non-payment of the debt. Whether this distinction is clear to debtors is difficult to assess.

At one time the small claims court in Ontario viewed its role as providing opportunities for dealing with rescheduling of debts and the Referee was heavily involved in this process. I am not sure whether this continues to be a significant role for the court. In brief encounters with administrators and judges I obtained the impression that for them the problem was perceived to be that of recalcitrant debtors and the need for strong enforcement powers. As I note below this perception of the amoral debtor is not supported by empirical data.

(i) APPEALS

An assumption of many reforms was that there should be restricted appeals in small claims courts. An extensive appeal system would raise costs unnecessarily, and advantage wealthier litigants, particularly given the rule of costs following the ultimate result. Moreover, if the small claims court was established partly as a forum which might differ in its approach from the higher courts, then an extensive appeal system might have the cumulative effect of shaping

the procedure of the small claims court in the image of the higher courts.⁹¹ On the other hand, where cases raise important points of law or of general interest, an appeal may provide the opportunity for developing applicable law and exposing the higher courts to areas such as consumer law.

Ontario legislation currently permits appeals where the amount in issue is over \$500. There has been an increase in the percentage of appeals brought since the increase in jurisdiction in 1993 (0.54% /1.11%). This may be compared with appeals from the General Division of approximately 15%. Evidence presented to the Civil Justice Review consultation hearings suggested that the existing appeal process is complex and long. This should be simplified, after making a decision on the fundamental question of the extent to which it is desirable to permit appeals. There are probably three options: ban appeals but permit the possibility of judicial review; same as 1 but allow appeals where a point of law of importance arises; permit appeals but raise the dollar threshold.

(j) SMALL CLAIMS COURTS AND DEBT COLLECTION

A continuity in the role of the court has been its integration in the process of debt collection. A persistent criticism of small claims court has been their deformation into debt collection agencies and domination by business creditors. There are two strands of argument underlying this criticism. First, it was argued that this created a chilling effect on individuals who might wish to bring claims. For example, officials of the court might develop continuing relationships with repeat-player creditors and show little interest in the one-shotter individual who would feel ill at ease in this alien environment. In addition, the informal nature of the court meant that creditors were subject to little scrutiny in proving their debt claims, creating incentives for fly-by-night sellers to rely on the courts as a means of recovering debts to which consumers might well have a defence or to create incentives for improvident extensions of credit. The lack of scrutiny by these courts might therefore be resulting in an overextension of credit.

Ruhnka and Weller tested the hypothesis of the "business chill". They concluded that the presence of business plaintiffs did not discourage other plaintiffs. There were as many claims filed per 100,000 population in states where businesses were banned as those states where businesses could use the court.⁹² I was not able to make an analysis comparing Quebec with Ontario, but it may be possible to test this hypothesis by comparing these jurisdictions. Apart from the empirical evidence, there is also the argument that a significant percentage of consumer cases involve consumers as notional defendants who have defended the business claim by withholding payment. Requiring an individual to defend in a higher court might simply result in fewer consumer cases. There is anecdotal evidence that creditors may currently use the General Division in cases within the jurisdiction of the small claims court. The empirical survey carried out for the Review indicates that 33% of cases in the General Division represent claims for under \$10,000 and it is possible that significant numbers of these may be default judgments on debt claims.

⁹¹ Judge Zuker in the Small Claims Court Handbook notes a number of cases under section 31 of The Courts of Justice Act. In one case *Montgomery J.* allowed an appeal on the basis that "the trial judge entered into the arena and intervened too far in the examination of witnesses. He also denied the right to cross-examine". There is clearly a danger here of appeal judges moulding the small claims court in the image of the higher courts.

⁹² See Ruhnka and Weller at 43 and Goerdts at 43-46.

The issue of the role of the small claims court in debt collection and its relationship to credit and marketing practices is more complex. There is empirical evidence that significant percentages of individuals have defences to debt claims but are unaware of them or unable, because of barriers to access, to assert them.⁹³ Their cases are often difficult because they are being sued on a boilerplate standard form and their defences may be based on oral promises made by sellers. While the parole evidence rule is not applicable under the *Business Practices Act*, there is still the difficulty of developing a defence from recollections of oral statements often made some time previously.⁹⁴

There is also a dissonance between the law's construction of the problem facing the individual debtor and their perception of the problem. For the court it is a legal problem, for the debtor it is a payment problem. The law has not traditionally recognized inability to pay because of change of circumstances, such as unemployment, as a form of social *force majeure*.⁹⁵ Judges may adopt a charitable equity, the court does work out payment plans, and the defendant may admit liability and offer a repayment schedule. But it is possible that many individuals simply do not see the court as relevant to their repayment problem, are not aware of their potential defences, or may equate their situation with being charged with a criminal offence. In his study of judgment debtors in an Ontario small claims court Puckett asked whether debtors contacted the court. Approximately 70% of those interviewed indicated that they did not contact the court because they accepted the creditors right to sue and assumed that they had no defence.⁹⁶

The problems of debt collection and the credit system are obviously much broader than reforms to procedures in small claims courts. In Canada, unlike Europe, there has been little public interest or concern in recent years in relation to over-indebtedness, notwithstanding record levels of individual bankruptcies. It appears to be conceptualized as a private trouble rather than a public problem. There are no reliable national statistics on home repossessions or automobile repossessions. The most recent statistics from the Superintendent of Bankruptcy indicates that the largest cause of bankruptcy for individuals (46%) is unemployment.⁹⁷

It is sometimes argued that problems in debt collection are caused by breakdowns in communication between creditor and debtor and that one reform should be to encourage greater communication between debtor and creditor. Undoubtedly it would make much sense to address the problems of repayment at an earlier stage but the current process is not structured to do so and existing documents concerning the enforcement of debts contain no information on how to deal with a debt problem. Ontario legislation contains no requirement similar to the UK *Consumer Credit Act* 1974 which requires creditors to provide information

⁹³ See e.g. *Civil Justice Review* (UK) (Cmnd 394, 1988) indicating that one-third of debtors in county court disputed the claim. D. Caplovitz, above at Ch. 6; H. Sterling and P. Schrag, "Default Judgments against consumers: has the system failed?" (1990) *Denver Univ. L. Rev.* 357.

⁹⁴ This is confirmed by a pilot study of a legal counselling experiment in Scarborough Small Claims Court in 1983. See Debra Ram, *Report on the Scarborough Small Claims Court Project: Legal Counselling Experiment*

⁹⁵ See T. Wilhelmsson, (1990) "Social Force Majeure-A New Concept in Nordic Consumer law" 13 *Journal of Consumer Policy* 1-14.

⁹⁶ Puckett above at 134.

⁹⁷ This statistic is drawn from an unpublished study of consumer bankruptcy by the Federal Superintendent of Bankruptcy based on 500 files from 1993.

on default notices indicating to debtors where they might turn to in order to get advice on dealing with the debt and negotiating with their creditors. While these sources of information are not a panacea, there would seem to be the opportunity here for initiatives which might reduce the use of the courts for debt collection.

Many of the above suggestions relate to addressing the individual problems of debtors, but this individualized approach may be relatively costly to administer. An alternative is therefore to encourage more routinized, across-the-board solutions. Many credit grantors are large organizations which gather large amounts of data on debtors⁹⁸ and which have routine procedures for collecting and writing-off debts, which are charged against their tax liability. One model of routinization is that of Ison who proposes that the retail enforcement of debt claims should be abolished. This would, he argues, result in a rough and ready balance between interests of creditors and debtors, preventing dubious claims by creditors. At the same time individuals who had no good reason for non-payment would be sanctioned through a refusal of future credit. The small minority of "professional debtors" would probably be unaffected since the existing system appears to be unable to enforce against them.⁹⁹ While I suspect that this proposal would be politically unacceptable, its assumptions concerning policy making in this area are very relevant. If it is likely to be too costly to develop a fair system of individualized justice in relation to debt collection and associated consumer claims, then public policy should explore further the use of across-the-board solutions and routinized procedures which, while occasionally resulting in individualized injustice, may provide an acceptable balance overall between the interests of the parties. One small reform is to use the pricing system and charge differential fees related to the number of cases brought before the courts by corporate creditors.

(k) MISSING VOICES AND DISSONANCES BETWEEN LAY AND LEGAL EXPECTATIONS

A continuing criticism of the court is that it is not a people's court, that it is used by relatively narrow demographic groups and that many disadvantaged groups and minorities seem not to mobilize the law through court action. McGuire and MacDonald document this phenomenon in relation to plaintiffs using the small claims court in Montreal (see below, Quebec).

Research is only beginning to place these courts in the context of the legal needs of differing social groups. It might be argued, for example, that those drawn from lower income groups have fewer legal needs than the middle-classes. A more plausible hypothesis is that their needs are different from the middle-classes. They are more likely to be in conflict with public institutions, face greater market exploitation and, consequently, law may play a substantially different role in their life to that of the middle-class individual.¹⁰⁰ It is also possible that individuals see clearly that the court appears to have little to offer them in order to resolve their problem and that the court is part of the problem. In relation to debt enforcement Martin Shapiro argues that courts have always played an important role in social control and that

⁹⁸ For a description see O. Gandy Jr. *The Panoptic Sort* (1994).

⁹⁹ See T.G. Ison *Credit Marketing and Consumer Protection* (1979) Chapter 10.

¹⁰⁰ See e.g. discussion in S. Silbey and P. Ewick, *Differential Use of Courts by Minority and non-minority populations in New Jersey* (1993) at 12-13.

In most legal systems once a legal debt has been voluntarily incurred, the law greatly favours the creditor over the debtor who cannot or will not repay. The debtor correctly sees judges hearing debt collection litigation as essentially engaged in enforcement of the law through the harnessing of public authority to the efforts of the creditor to collect. Thus in most debt actions the debtor simply does not appear in court for the litigation and loses by default.¹⁰¹

It is also possible that many of "the people" are clear-sighted about the limitations of the small claims court as a solution to their problems and prefer to take control of their problems through alternative methods rather than losing control by going to court.

Recent research raises questions about the extent to which the use of small claims court is an empowering experience for individual litigants. In a rich ethnographic study of the relationship between what individuals wanted from small claims courts and what the court provided, Conley and O'Barr indicated a discord between litigants' objectives and those of the legal system.¹⁰² They identified three types of discord. First, litigants may often be seeking an intangible benefit, such as wishing to tell their story and this may clash with the laws' interest in processing claims efficiently. Litigation may be both a therapy and the opportunity to have one's story validated by an authority figure but often the story of the breakdown of a relationship was cut short or transformed into categories appropriate to legal rules. Hence the title of their book "Rules versus Relationships". Second, individuals may be pursuing an agenda different from that perceived by the judge who hears the case. Finally, litigants may often misperceive the power of the court to seek out and punish the opposing party. This blurring of criminal and civil process may contribute to the often high levels of dissatisfaction expressed by litigants in relation to the collection process in small claims courts. Individuals may expect the court to punish the defendant for exploiting a relationship.

The authors conclude that law often defines problems of ordinary people in a manner which may have little meaning for them and which does not offer them the remedies they desire. Yet curiously they found that the system seemed to maintain credibility because individuals attributed their frustration to the limitations of the particular actors encountered, such as judges or administrators, rather than with the law itself. Individuals learn that the law is a very limited instrument for righting wrongs but that this limitation is attributable to the reality of the implementation of the law rather than the ideal of the law. They conclude that "It is hard to imagine a more effective mechanism for maintaining the status quo".¹⁰³

These studies also raise questions about the nature of small claims courts. Are they to be modelled on higher courts or are they to provide an opportunity for an individual to tell their story in an informal setting? Can they provide an alternative form of community justice, taking into account community norms? An example of the latter type of institution is the New Zealand system of small claims courts where adjudicators are in general not lawyers, where mediation is important and adjudicators have a broad discretion to decide on equitable grounds.

(I) BRITISH COLUMBIA REFORMS

In 1991 British Columbia introduced a new small claims court program intended to respond to concerns identified in relation to the delay, cost, complexity of existing procedures,

¹⁰¹ M. Shapiro, *Courts* (1981) at 19.

¹⁰² See generally Conley and O' Barr above.

¹⁰³ *Id.* at 165.

problems of enforcement of judgments and problems of rural access.¹⁰⁴ The main aspects of the reforms are: the jurisdiction of the court was raised from \$3,000 to \$10,000 (against the recommendation of the Justice Reform Committee): plain-language forms were introduced: mandatory settlement conferences were introduced for disputed claims and enforcement procedures were streamlined.

The British Columbia government commissioned research to evaluate the impact of these changes.¹⁰⁵ The change in jurisdiction resulted in 41% more claims being filed, with the increase in volume entirely within the \$3000 to \$10,000 range, with possibly a decrease in claims under \$3000. These additional claims did not represent solely a transfer of business from higher courts but reflected an increased demand for court services[external factors such as the economic depression of 1990, may have also affected the number of cases]. There were no major changes in the composition of the caseload of the court, although 28% of claimants were individuals compared with 22% before the changes, with higher numbers of individuals suing private firms. Debt claims accounted for 74% of the claims and 68% of plaintiffs were private firms.

The research unfortunately provides few further details on the nature of the claims. In a survey of lay litigants (based on a sample heavily weighted to plaintiffs (69%)), it found that 75% had completed high school, 71% were born in Canada, 91% had English as a linguistic background, 78% were over 31 and surprisingly 39% had previous court experience.

The impact of the plain-language forms is not clear since the lay litigant group was a relatively well-educated group (matching the test group used by the plain-language centre) and they concluded that they were unable to test the impact on individuals with low literacy skills or from differing language groups.

Default judgments declined and there was an increase of 13% in the number of replies to claims filed. It is possible, as argued by the evaluators, that the use of the plain-language forms may have encouraged individuals to defend. It is also possible that given the larger numbers of business defendants and the higher amounts claimed that there was a greater likelihood of a reply being filed.

The study did not indicate the percentage of cases over \$3000 which resulted in disputes.

The study concluded that the mandatory pre-settlement conference achieves a large number of settlements and "offers a true alternative in dispute resolution". There are a number of issues however which are not addressed by the research in relation to this conference. First, the assessment was based partly on lay litigants' response to the question whether they found the conference "useful". There was no probing of issues such as the quality of the outcome, how well defendants or plaintiffs did in this hearing, the fairness of the process, or whether they were satisfied with their role in the process. Second, the evaluators did not compare the experiences of individuals whose cases were adjudicated with those which were settled at the pre-settlement conference. Third, the general questions asked concerning the small claims process did not attempt to distinguish between litigants who had merely filed claims and those who had a full adjudication. No distinction was drawn here for example between disputed and default cases. Finally, professional litigants were less enthusiastic about the process. It seemed to them to represent a potential impediment in the routinization of debt collection by offering the possibility of individuals using it as a delaying tactic.

¹⁰⁴ See British Columbia Justice Reform Committee, *Access to Justice* (1988).

¹⁰⁵ See Adams *et al* Appendix 1.

The settlement conference reduced from 24% to 8% the number of trials held. However, since judicial time is now focused on the settlement conference, the waiting time for trials is over twelve months. For many litigants the settlement conference has replaced the trial as their day in court and, given its mandatory nature, one wonders whether one can conclude that it is offering "a true alternative in dispute resolution".

(m) QUEBEC

Quebec provides an example of a court which meets many of the ideals of the small claims movement of the 1960s and 70s. It is sometimes argued that this model is not of relevance to Ontario because Quebec is a civilian jurisdiction with a different legal tradition, in particular in relation to the role of the judge. This is incorrect. While Quebec is indeed a civilian system, its system of civil procedure is adversarial and does not incorporate the inquisitorial system of the civil law. Of greater significance in assessing the experience of the small claims court is the fact that in Quebec there exists a Provincial Court with a monetary jurisdiction of \$15,000.

There has recently been a major investigation of the small claims court in Montreal by McGuire and MacDonald.¹⁰⁶ This study focuses on the role of the court as a disputing institution in a multi-cultural urban environment. This promises to be a rich study of the court and its users and non-users. A preliminary conclusion of the researchers is that, notwithstanding all the legal reforms in the small claims court, it still functions as an agency for the haves who are often collecting debts. They conclude:

The bulk of the court's clientele are men as opposed to women, professionals and/or business people as opposed to consumers, the well-educated as opposed to the less-educated, the wealthy as opposed to the poor, the European as opposed to the ethnic minority, the secular as opposed to the religious, the French or English as opposed to the allophone".

These conclusions appear to conflict with Vidmar's analysis of the small claims court in Middlesex County, Ontario. What accounts for these differing interpretations of the performance of small claims courts? Vidmar did not analyze the demographics of the users of the court so that the Montreal study provides a corrective to his conclusion that the small claims court serves "the little guy". The Montreal study only studied plaintiffs who used the court and did not adopt any of the methodological approaches of Vidmar in analyzing the situation of the "reverse plaintiff", or breaking down cases into full/partial and no-liability cases. Although the reverse plaintiff might be a less significant phenomenon in a court where incorporated businesses cannot sue, those cases where the plaintiff was an unincorporated business would not be identified.¹⁰⁷ The study clearly indicated that there was a certain percentage of debt collection cases (primarily brought by professionals) which resulted in no-contest by the defendant (about 40%). There was, therefore, a distinction in the case load of the court similar to Vidmar's distinction between the disputed and the non-disputed case. However, the Montreal study appears to treat all cases as part of the same universe for the

¹⁰⁶ See references in appendix 1.

¹⁰⁷ The authors of the study indicate that their study would have picked up situations where an individual withheld payment and was sued by a business in the higher courts since these cases are transferred to the small claims court. (Communication on file with author).

purpose of analysis of such questions as demographic breakdown, success in using the court and so on.¹⁰⁸

The contrasts between these studies illustrate the need for further analysis of the differing roles of the court. At the same time both studies underline the fact that the majority of the business of the small claims court relates to a narrow band of business debt collection and the Montreal study points to the significant missing voices in the small claims court, in particular, women and minorities.

A further aspect of the Montreal study was to investigate judges' attitudes and approaches to sitting in the small claims court.¹⁰⁹ In interviews with judges, they found that although judges might take a more active role, they did not see their role as inquisitorial and were uncomfortable at the idea of "empowering weaker parties". A majority of judges did not like adjudicating in the small claims court. It was even suggested that assignment to the small claims court might be regarded as a form of surrogate punishment for judicial misconduct. Judges find the court to be hard work. They saw themselves as translating litigants' stories into legal forms and categories rather than attempting to understand the litigants' understanding of the problem which was brought before them. They were reluctant to take into account differing cultural norms and many expressed racist stereotyping in describing particular cultural groups:

Asians were characterized as patient by one; non-litigious by another; timid by a third. Haitians were depicted as verbose by one judge; fawning by another. Italians were said to be litigious by one judge; untruthful by another. One judge characterized the French as voluble; another as litigious. The English of Pointe Claire were said to be well-organized. One judge said that the Arabs and the Chinese are prone to believe that they are discriminated against when they are not.¹¹⁰

5. SMALL CLAIMS COURTS WITHIN THE LANDSCAPE OF CONSUMER REDRESS MECHANISMS

A continuing theme in consumer protection has concerned the high enforcement costs in relation to consumer rights, particularly in the area of pure economic losses. These costs may not only prevent consumers from obtaining satisfaction, but also result in insufficient incentives for business compliance with legislation. The high costs of private enforcement are a major reason for the existence of public regulation in areas such as misleading advertising where losses may be small individually but large in aggregate.

There are two overall objectives in this area: redress and compliance. Compliance might include not merely achieving perfunctory compliance, but also providing guidance on "best practices". In this way, redress mechanisms might stimulate quality upgrades, part of achieving the "competitive advantage" for business which was argued for by Michael Porter.¹¹¹

¹⁰⁸ One of the authors has indicated to me that there are no significant differences in demographics between debt collection and disputed cases.

¹⁰⁹ Seana McGuire and Roderick Macdonald, *Judicial Scripts in the Dramaturgy of the Small Claims Court* (1996) 11 *Canadian Journal of Law and Society* 63.

¹¹⁰ *Id.* at 28.

¹¹¹ See Michael Porter, (1990) *The Competitive Advantage of Nations*.

In this section, I will examine two “alternatives” to the courts in the area of consumer redress: the market and third-party redress mechanisms. There have been a growing number of studies in North America and Europe which have mapped the landscape of consumer disputing and the differing ways in which consumer problems are pushed towards and diverted from the legal system. There now exist in many countries a variety of alternative to judicial action including industry arbitration schemes, ombudsmen, industry compensation funds and government dispute settlement mechanisms.

There are several reasons for studying this landscape of consumer redress and the relationship between “private” redress mechanisms and the courts. First, given the present fiscal crisis and trends to deregulation and privatization, there is much governmental interest in encouraging private redress mechanisms as part of alternatives to existing regulatory schemes.¹¹² There is a need to focus on the central criteria for evaluating these mechanisms. Second, an investigation of these mechanisms helps to place the civil justice system in context. How significant (defined in terms of access, bargaining power, symbolic and cultural messages) are the courts for individuals with consumer problems? Consumer rights are sometimes cited as part of the “proliferating legislation” which could be contributing to the new social disease of hyperlexis. An examination of how consumer problems are solved in everyday life might test this hypothesis, at least in relation to consumer claims.

Third, by looking at the patterns of consumer problems and their resolution we might suggest alternative methods of addressing them which might reduce the need for the use of third-party mechanisms and courts.

Fourth, this topic allows us to recognize what has always been true, that individuals live in a complex network of relationships in society (the household, the workplace, the market), that these relationship develop their own norms and that the relationship of these norms to the law and regulation by the state is neither simple nor hierarchical. Law is therefore plural rather than singular and individuals may appeal to several normative systems in their everyday life.

Finally, this recognition of pluralism underscores the fact that governments have always relied on private interests and industry as a source of information and as a means of policy implementation. This is a continuing rediscovery for legal scholars. So-called “self-regulation” may range from the use of private inspectors within firms, through the delegated powers of professional bodies to “mandated self regulation” where an industry body is part of a governmental framework of regulation.¹¹³ The sharp distinction which has been drawn between the public and the private has been often more ideological than real. The exact nature of the relationship between government and industry depends on many factors including the political role of the particular industry. Some authors perceive a shift in the relationship of governments to private actors resulting in a further growth in “private governments” which may be international in scope (eg standard-setting agencies). These bodies may be a source for

¹¹² In Ontario, The Ministry of Consumer and Commercial Relations is promoting the development of industry self-regulation based on the model of automobile arbitration and the Home Warranty programme. At the Federal level, Bill C 62 “An Act to provide for the achievement of regulatory goals through alternatives to designated regulations and through administrative agencies” envisages the Federal Government approving compliance plans which under s. 9(3)(a) may include terms and conditions respecting “quality assurance, complaint resolution or other management systems”.

¹¹³ I discuss the differing models of self-regulation in I. Ramsay *Consumer Protection: Text and Materials* (Weidenfeld and Nicolson, 1989) at 90-92 and “mandated self-regulation” at 388-396.

the development of norms, raising questions relating to democratic participation in their development.

(a) BARGAINING, MARKETPLACE NORMS AND LAW'S SHADOW

The preamble to the Civil Justice Review indicates that "traditionally in Ontario members of the public have resolved their civil disputes through the court process". Much evidence in the consumer area suggest the opposite conclusion: that consumers rarely use the court process for disputes in relation to economic losses.¹¹⁴

During the past two decades researchers in several countries have provided exploratory maps of the disputing behaviour of individuals with grievances. Vidmar's study in Ontario¹¹⁵ of consumer problem solving indicated a relatively high claiming rate against suppliers in relation to perceived consumer problems (over \$1000). There is a high rate of complaining in relation to product purchase problems and tradespersons' services, but a low rate of complaining concerning professional services. Success rates at the level of two-party negotiation were highest for products and tradesperson services and lowest for professional services, debts and private sales. One of the conclusions was that, "Canadians predominantly preferred to handle their own minor problems without the intervention of active help of third parties of any kind".¹¹⁶

Many consumer disputes are therefore settled or filtered out at the level of two-party negotiation between the parties. The significance of this was underlined in articles by Ross and Littlefield¹¹⁷ and by Ramsay.¹¹⁸ Ross and Littlefield studied the complaint-handling practices of a major appliance store in Denver, Colorado. They found that complaint to a retailer was both a cheap and effective form of redress for consumers. Consumers often obtained more than their legal entitlement. This store served generally a middle-class clientele and the authors wondered whether the factors which led to generous return policies (the prospect of repeat purchasers and the willingness and ability to complain effectively) would apply to economically disadvantaged groups.

Studies suggest that redress at this level may be responsive to a number of pressures. Market norms may be significant where sellers are dependent on repeat-purchases and consumer goodwill. Social class may have an impact. It is not clear from the literature the extent to which lower income consumers have less success in complaining, although the majority of studies do seem to indicate lower levels of success for lower income consumers.¹¹⁹

¹¹⁴ See references in Ramsay at 123-129.

¹¹⁵ Neil Vidmar, "Seeking Justice: An Empirical Map of Consumer Problems and Consumer Responses in Canada" (1988) 26 *Osgoode Hall L.J.* 757.

¹¹⁶ Vidmar at 794.

¹¹⁷ L. Ross and N. Littlefield, "Complaint as a Problem Solving Mechanism" (1977-78) 11 *Law and Society Review* 199.

¹¹⁸ See I. Ramsay, "Consumer Redress Mechanisms for Defective and Poor Quality Products" (1981) 31 *Univ. Of Toronto L.J.* 117.

¹¹⁹ Vidmar found that lower income consumers were as likely to have success with complaining as higher incomes, but McNeil, Trubek *et al* found discrimination in relation to lower income complainers in used car market. See McNeil, Nevin, Trubek and Miller, (1979) "Market Discrimination against the Poor and the Impact of Consumer

Recent evidence indicates market discrimination based on gender and race in automobile selling in the USA¹²⁰ and it is possible that discrimination may seep through to the complaint process. There has been little recent study on complaint handling in markets which focus primarily on low income consumers (e.g. rent-to-own) and so on.¹²¹ Studies have also noted that consumers are less likely to complain about or have success in resolving judgmental rather than manifest problems in relation to product purchases. This is reflected both in relation to complaints made to sellers and those brought to third parties. Thus issues involving durability, product design or the interpretation of sales talk may be less likely to be effectively resolved at this stage.

The policy implications of these findings are significant. First, they suggest that greater attention should be paid to affecting the dynamics of two-party negotiations and identifying those markets where problems remain unresolved. For example, the area of services, including professional services, might be the focus for greater analysis. Contracts for services such as home repairs and renovations appear to represent a significant number of trials in small claims courts. Causes of disputes here may be a lack of clarity as to the relative obligations of the parties, the amounts which are due under the contract and disagreement on technical issues. Professional services and home renovations are often customized contracts, and there may be greater subjectivity in the expectations of the parties in services contracts. One possible reform is therefore to attempt to standardize these transactions, drawing a rough balance between the interests of the parties, and establishing clear standards of expectations which are written into the relevant contract.

For example, in a slightly different context, a continuing problem has related to high pressure selling in relation to various forms of health clubs, dance studios and so on where there is evidence that consumers have been pressured into long-term contracts. The cooling-off period was the classic consumer remedy invented in the 60s to allow for second thoughts. But there is evidence that cooling-off periods are not always effective. Another alternative therefore is to establish a legislative scheme which allows a long-term right to rescind, subject to a sliding scale of charges for benefits received. These would be written on the face of the contract. This is the approach adopted by California and New York.¹²² The advantages are that it may avoid disputes, allows the process to become company "policy", and may reduce the need for public resources to be spent in dealing with disputes. There is the added effect that, to the extent it is self-executing, there will be less need for monitoring or reliance on the waxing and waning of the zeal for public enforcement.

Another approach may be to use a "bright-line" sanction as a method of ensuring both compliance with legislation and reducing the need for reference to a third party. For example, a persistent source of complaints has related to auto repairs. The Ontario *Motor Vehicle Repair*

Disclosure Law: The used car industry" 13 *Law and Society Review* 695. The Office of Fair Trading found a correlation between success in complaining and social class. See *Consumer Redress Mechanisms* Office of Fair Trading, 1991. See also A. Best and A. Andreasen, (1976-77) "Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints and Obtaining Redress" 11 *Law and Society review* 701.

¹²⁰ I. Ayres, "Fair Driving: Gender and Race Discrimination in Retail Car Negotiations" (1991) 104 *Harvard L. Rev.* 59.

¹²¹ Laura Nader (see above) includes a study of the complaint handling practices of Walker-Thomas, the low-income retailer involved in the famous case of *Williams v Walker Thomas*.

¹²² See, for example, California Civil Code 1812 .50.

Act 1988 imposes various disclosure requirements which must be posted in repair shops. In addition, service dealers must obtain written authorization for all work. A failure to follow the requirements of this Act results in the consumer being under no obligation to pay the bill. This type of approach seems to be particularly appropriate as part of an industry-wide scheme where there is little excuse for those entering the industry to be ignorant of industry norms. Marketplace norms in many commercial relationships are detailed and precise. The majority of terms in many consumer contracts have been established over a period of time by lawyers for businesses. While they are undoubtedly responsive to consumer pressures on certain terms, there is little opportunity for influence over many others. In consequence, while the marginal consumer (whom one might hypothesize is equated with better education, higher income) may be successful in achieving satisfaction in individual cases there is a need to ensure a general level of fairness in the market so that it is not merely the "squeaky wheel" who gets the grease. Non-marginal consumers will not free-ride on the activities of marginal consumers unless general practices are changed in response to individual complaints or litigation. The issue of market discrimination in complaint handling merits further investigation.

(b) THIRD PARTY MECHANISMS

A characteristic development of consumer markets in many countries has been the development of alternative forms of dispute settlement. These include arbitration and mediation schemes operated by industry, ombuds, and hybrid industry/government schemes. Examples include arbitration plans in the automobile and new home industry, compensation funds in the travel industry and ombuds in the financial services industry. In addition, government consumer ministries often provide mediation for consumers.

There are several reasons for the establishment of industry mechanisms. From the government's viewpoint they avoid direct costs and harness the resources of industry. In certain situations they may allow the government to appear to be aiding the consumer by providing symbolic benefits without antagonizing a powerful or concentrated business interest. They may also represent a continuing tradition of private/public cooperation in the implementation of policy. From the industry's viewpoint they may forestall government regulation and, more positively, be a useful method of enhancing an industry's market image. They may be part of an overall system of "self-regulation" or "private government".

The technical arguments in favour of industry mechanisms stress their informality, low-cost, flexible remedies, guarantees of compliance and ability to take account of industry expertise. It is also argued that the norms applied by these programmes may change more quickly since there is not the necessity for legislative amendment. They may also provide information on recurring problems within an industry which could result in managerial response and upgrading of standards. To be effective, most commentators indicate that it is necessary to ensure the independence of the mechanism from industry influence if it is to enjoy consumer confidence. In addition, the procedures should be open, accessible, fair and effective.

There are various institutional frameworks possible for developing these mechanisms with usually some oversight role being entrusted to a government agency. For example, in the UK the Office of Fair Trading is under a duty to encourage industry codes of practice as an aspect of its consumer protection activity and may exempt these codes from restrictive trade practice

legislation.¹²³ A common feature of the codes is to include procedures for resolution of complaints and codes of practice exist in most areas where there were high levels of consumer complaints. The development of the codes is primarily undertaken by the relevant industry and the OFT periodically monitors the performance of codes, giving publicity to areas of non-compliance and sometimes threatening legislation if standards do not improve.

It is important to understand the role of these mechanisms against the political background of different jurisdictions. This not only refers to the relative power of particular industries but also regulatory traditions. There is in Ontario a slightly corporatist hue to consumer protection legislation with a tradition of establishing sectoral legislation with licensing powers, involving continuing contact between industry and regulator in policy implementation. Recent initiatives in consumer protection involve an intermingling of private and public. There have been few studies of the relationship between government and industry in this area, assessing the application of various theories about the performance of government regulation in the consumer context in Ontario.

(i) Complaint Handling by the Ministry of Consumer and Commercial Relations

The Consumer Services Branch received approximately 20,000 telephone enquiries in 1994-95 and there were approximately 3,000 formal written complaints. Although statistics on the areas of complaint were not available, in recent years the three major areas were automotive repair, purchase of new and used cars, and home repair and renovation. The Bureau will provide consumers with information and send them a "kit" on how to rescind contracts under the *Business Practices Act* and how to proceed to small claims court.

There is no systematic study of the general complaint handling practices of Ministry. Samuels and Vidmar studied complaint handling in relation to complaints relating to the *Business Practices Act* in 1982-83.¹²⁴ The mean amount of a complaint was \$550. They found that the Ministry had a philosophy of "self-help" in relation to complaints. In the majority of cases individuals would be provided with information on their rights but no further action would be taken by the Ministry if the business responded by refusing to provide redress. In general, the Ministry played a neutral intermediary role unless there were a pattern of complaints.

The study provided no demographic information on the complainants. There were very few complaints relating to the unconscionable practices provisions of the BPA. If such marketing practices are more prevalent in relation to lower income or disadvantaged groups, then one wonders whether this is further evidence of the limits of complaint as a remedy in relation to unconscionable selling practices. It is also possible that these practices are very rare. There were significant numbers of complaints in relation to potential "bait and switch" practices. Many consumers (53%) were complaining about unsatisfactory performance which, might, technically, not fall under the *Business Practices Act*. The Ministry provided information and mediated these disputes even though there is no legislative authorization to do so. A majority of complainants achieved full or partial restitution and slightly over half of the complainants

¹²³ The development of these codes is discussed by Ramsay in "The Office of Fair Trading: Watchdog of the Consumer Marketplace" in R. Baldwin and C. McCrudden *Regulation and Public Law* at Chapter 9.

¹²⁴ See J. Samuels and N. Vidmar, "Consumer Complaints and Unfair Trade Practices: An Empirical Study of Ontario's Business Practices Act" (1987) 14 *Univ. Western Ont. L. Rev.* 83.

were satisfied with the Ministry's intervention, with 25% being dissatisfied. Information made available to the author indicates that since that date, the Consumer Services Bureau has closed all seven regional offices and now operates only from Toronto. It has a voice mail system for processing inquiries and has instituted a priority system to concentrate on complaints from vulnerable consumers. There may be more intervention in relation to cases involving vulnerable consumers.

It is difficult to draw conclusions on the success of the Ministry since much of the work takes place at an informal level. The role of the Ministry might be compared with the role of lawyers in consumer disputes. There is no Canadian study on this topic but Stewart Macaulay investigated this issue in the late 1970s in the USA.¹²⁵ He found that lawyers tended to "cool-out" consumers and perhaps achieve a settlement on their behalf. Few lawyers were interested or knowledgeable about consumer law. The reasons for this lack of interest were not purely economic given the small amounts involved in consumer claims. Many lawyers were not particularly sympathetic to consumer claims and even "radical" lawyers did not think consumer claims were very worthwhile. Of central importance to this study is the fact that an important site for dispute settlement is in lawyers' offices. If this resource is not available for many consumer disputes then institutions such as the Ministry may be acting as a substitute.

(ii) Automobile Arbitration Programmes

Disputes concerning defective or "lemon" automobiles comprise the majority of reported consumer litigation and provide a useful example of the problems of consumer redress. Automobiles are a high-priced item and disputes concerning them may be beyond the existing jurisdiction of the small claims courts. The costs of using the regular courts may be prohibitive for a consumer. Disputes may often require expert evidence and the existing substantive legal standards for redress are vague and imprecise.¹²⁶

Two US developments form the background to the development of automobile arbitration in Canada. The first is the Federal *Magnuson-Moss Warranty Act*¹²⁷ which introduced informal dispute settlement in warranty disputes. Consumers must have recourse to mechanisms established by manufacturers before going to court, provided the mechanisms meet certain standards. These standards include¹²⁸: no charge for use; ensuring the redress mechanism is independent of the manufacturer; requiring settlement of the dispute within 40 days of notification; maintaining a record of the brand and make of product involved and other

¹²⁵ See S. Macaulay, (1979) "Lawyers and Consumer Protection Laws" 14 *Law and Society review* 115.

¹²⁶ Under the Sale of Goods Act, sellers of automobiles must provide the purchaser with an automobile which corresponds with its description, is of merchantable quality and fit for the particular purpose. Breach of these obligations entitles the consumer to a *prima facie* right to reject the goods. The uncertainty in the application of these standards and limitations on the right to reject mean however that a consumer has no clear standard to appeal to in bargaining with a dealer. Moreover while a manufacturer may provide a warranty, it will always limit the consumer's right to reject the automobile and get their money back. Moreover, if the consumer rejects the automobile, and the seller refuses to return the price or retake the automobile then the consumer is in a difficult position, since continued use may jeopardize the right to reject but few individuals will be willing or able to pay for a substitute while the dispute is processed.

¹²⁷ Magnuson-Moss Warranty Act, Pub. L. No. 93-637, Title 1, 88 Stat. 2183 (1975) (codified at 15 U.S.C. 2301-12).

¹²⁸ See 16 CFR 703 (1985).

statistical information: the consumer is entitled to go to court if dissatisfied with the decision of the mechanism.

In response to dissatisfaction with the scope of Magnuson-Moss several states enacted "Lemon Laws".¹²⁹ These laws established sharper standards for deeming a car to be a "lemon", entitling a consumer to a refund or replacement. In addition, a number of states were dissatisfied with the industry mechanisms established pursuant either to Magnuson-Moss or lemon laws and enacted their own arbitration programme.

In Canada, the major initiative in this area was the development of the Ontario Motor Vehicle Arbitration Programme in 1985. This has now become, with relatively minor modifications, the Canadian Motor Vehicle Arbitration Programme, which is available in all provinces, except Quebec. The Ontario programme developed as a response by the auto industry to the fear of introduction of a Lemon Law. The original Ontario programme was established as a hybrid form of non-statutory organization, presided over by a Board composed of representatives of the government, the automobile industry, arbitrators, the Better Business Bureau and consumer representatives. The programme is financed by the automobile industry and is free to consumers. Consumers who wish to use the service must normally exhaust the internal complaint mechanisms of the manufacturer before using the plan. The jurisdiction of the plan includes disputes relating both to a manufacturer's new vehicle warranty, and to new and used cars purchased or leased from authorized dealers, and applies to defects in workmanship or material in the vehicle. It will hear, therefore, cases which would often be above the existing jurisdiction of the small claims court. It does not hear claims for personal injuries or property damage. Arbitrations may be held in the consumer's home community. The arbitrator may award vehicle repairs, a buy back or replacement, and limited financial compensation for out-of-pocket expenses. The arbitrations are private, all information, documents and testimony are treated as confidential, the consumer gives up her right to go to court and the decision of the arbitrator may only be overturned based on the grounds available for judicial review of arbitration awards. The agreement for arbitration does not establish any standards for decision making. The company agrees to implement the award within thirty days.

A review of the operation of the Ontario plan was conducted in 1988 and published in 1989.¹³⁰ While there were limitations in the scope of the report it did provide some useful data on the demand for the programme, the nature of cases being brought to the mechanism and consumer perceptions of the programme. The data show that although the programme received a large number of inquiries the number of arbitrations were only 381 and 311 in 1988 and 1987 respectively. Few consumers obtained a buy-back or a cash refund, the majority receiving some form of cash adjustment. Interviews with consumers who had used the programme indicated that before turning to the programme they had experienced on average 9 repairs, with the average time from when the problem first arose until turning to the plan being

¹²⁹ The Lemon laws eliminate privity between a purchaser and manufacturer: require a refund or replacement after a reasonable number of attempts to repair, regardless of warranty limitation, specify the number of repairs that will constitute a reasonable opportunity to repair: encourage arbitration. See D. Pridgen, *Consumer Protection* at 15-01. New York State presumes an automobile to be a lemon after 4 attempts at repair or 30 days in the garage and the coverage is 2 years or 18,000 miles.

¹³⁰ P. Mercer, "Two Year Review of the Ontario Motor Vehicle Arbitration Plan" (1989).

11 months. Almost three-quarters experienced out-of-pocket losses (defined as including repairs, car rental, legal fees, towing charges, taxi bills and other) which, even excluding repairs, appeared to exceed the plan limit of \$350.¹³¹

The average waiting time from signing the arbitration agreement until the hearing was 8 weeks. (CAMVAP appears to be slower: the average time is 61 days). The vast majority of consumers represented themselves at the hearings (93%). Forty percent of those who responded did not think the hearing was conducted in a fair manner (primarily respondents feeling intimidated), only 30% of the respondents felt that the award was fair and only 41% were satisfied with the process. Yet surprisingly 56% stated that they would use the process again. It is difficult to extrapolate too much from these raw data, but they suggest a significant level of consumer concern about the process. The individual consumer in the arbitration is pitted against a repeat-player representative from the company and this perhaps accounts for the finding in the Report that "although the process is relatively informal, respondents still feel intimidated".¹³²

There is also reason for concern when the performance of the Ontario plan is compared to that of the New York State lemon law arbitration programme which appeared to have a higher rate of refunds and replacements than under the Ontario plan.¹³³ This might be partly accounted for by the sharper standards to be applied in the New York Programme.

It is also important to assess the impact of these schemes on "bargaining in the shadow of the law". To the extent that there are clearer standards in the lemon law arbitration this may provide a better signal to the parties concerning a potential decision, thereby enhancing the likelihood of settlement. In this respect the New York law is superior to the Ontario provision. A comparison of the OMVAP programme with the courts would have to account not only for the comparative costs of arbitration and litigation but also the impact of the threat of litigation on incentives to settle.

It is not clear what the impact of OMVAP has been on manufacturers' production practices. The Annual Report of the New York programme lists the makes of automobiles involved in arbitrations and their success rates. It is possible that this form of publicity may have some impact on production practices and could be a useful method for detecting patterns of problems.

The experience of the automobile arbitration plan suggests that reforms might be directed towards the establishment of clearer standards which might have an impact on bargaining. There is also the issue of expert evidence which may be necessary in these cases. CAMVAP itself does not provide independent expert advice and arbitrators are not experts. Consumers must pay for their own expert.

The development of the automobile arbitration plan reflects a political compromise between various interest groups.¹³⁴ Government interest at the time of its introduction appeared to be in seeking alternatives to legislative regulation, reducing the congestion in the courts and in seeking partnership solutions. The most active consumer group in this area (The Automobile Protection Association) was sceptical about the arbitration scheme, but the Consumers

¹³¹ See Mercer at 75.

¹³² Mercer at 81.

¹³³ Mercer at 17.

¹³⁴ The following is based on the account by Mercer.

Association of Canada supported it. The industry viewed it as a method of preventing legislative regulation. Mercer indicates that they accepted the "program grudgingly as a major goal of industry was (and is) to avoid being subjected to lemon laws."¹³⁵ When the programme was introduced consumerism was not a powerful force in Ontario, the automobile industry is the largest manufacturing industry in the province and the government may have identified the need to be responsive both to a diffuse but not strongly articulated consumer concern and the interests of a powerful provincial industry. All of these factors were set against a general ideological background of deregulation. The industry seems to have been relatively successful since a number of the provisions of the programme might suggest that the mechanism is a means of "defusing" potential consumer dissatisfaction (confidentiality, no clear standards, no "scorecard" identifying manufacturers). There has also been concern expressed that the board of OMVAP was dominated by industry with one member of the board arguing that the presence of consumer members on the board was mere "window dressing".¹³⁶ The current CAMVAP board has 5 industry representatives, three government representatives and two consumer members. Its publicity material indicate that it now has "very effective and very strong consumer representation".

Since writing the above comments on automobile arbitration, I have now received the first annual report of CAMVAP for 1994. Of the 189 cases arbitrated consumers obtained a buy-back with or without a reduction for usage in 36 cases. Over 73% of arbitrated cases resulted in some form of award (repair, reimbursement for repairs) for the vehicle owner. One of the main differences between this report and Mercer's report appears to be the finding that in cases where out-of pocket expenses were claimed, 95% of claimants reported out of pocket expenses of less than \$350. Until there is a systematic analysis of the process and outcomes of this plan, it remains difficult to conclude whether CAMVAP is a successful consumer redress mechanism.

(iii) Ontario New Home Warranty Programme

The Ontario New Home Warranty programme was established by legislation in 1976.¹³⁷ It is administered by a non-profit corporation. There are consumer and government representatives on the board, but representatives of the Ontario Home Builders Association comprise a majority of the board. All builders and vendors of new homes must be registered with the plan and meet minimum standards of integrity and business competence. Purchasers and sub-purchasers of new homes have the benefit of a warranty that the home is fit for habitation, constructed in a workmanlike manner and free from defects in material, is constructed in accordance with Ontario Building Code and is free of major structural defects. The warranties are of differing duration, with a warranty against structural defects for seven years. The Act also provides protection against delayed closing and occupancy in the case of condominiums and protection against unilateral substitution of materials. There are caps on liability under the Act with a maximum coverage of \$100,000. Individuals may also make claims for return of deposits.

¹³⁵ Mercer at 44.

¹³⁶ Mercer at 60, noting the perception of "Board being run by industry".

¹³⁷ See now *Ontario New Home Warranties Plan Act* R.S.O. 1990 c. O.31.

Individuals with claims under the Act make the claim directly to the Warranty Corporation which will attempt conciliation. The corporation is required, within fourteen days of the conciliation, to provide a decision in writing setting forth the remedial work if any which may be required to settle the dispute. Conciliators are drawn from the building trades, and are employees of the corporation. There is a right of appeal to the Commercial Registration Appeal Tribunal. Data indicate (see Table 2) that there are relatively large numbers of claims made to the Corporation with approximately one in four new home purchasers making a claim on the Corporation.

Table 2

| Year | # of Paid Claims | Number of Conciliations | Number of Complaints |
|------|------------------|-------------------------|----------------------|
| 1990 | 1550 | 2600 | 12,600 |
| 1991 | 2010 | 2070 | 12,240 |
| 1992 | 1270 | 1740 | 9675 |
| 1993 | 700 | 1630 | 8975 |
| 1994 | 687 | 1757 | 9396 |

The average length of time from receipt of claim to disposition was 135 days in 1994. There are also a significantly large number of appeals to the Commercial Registration Appeal Tribunal. In 1994 there were 151 appeals. The majority of consumers appear to represent themselves before the CRAT and appeals from the Home Warranty programme constitute a large part of the business of the tribunal. The Warranty programme claims, in its 1991 report, that it is successful in the majority of cases before CRAT. A brief and unsystematic analysis of the cases before CRAT indicate that the tribunal is willing to make orders which would not normally be made by courts, such as specific performance of building contracts. The Warranty Corporation has a subrogated interest in claims paid and has recovered \$23 million of the \$127 million it has paid out since the programme began. A disproportionate number of claims are attributed to small builders who build less than five units.

There is a connection between redress and loss prevention in this programme. The reason for the development of a loss prevention programme apparently lay in the large numbers of claims arising out of the 1980s real-estate boom. In order to maintain the solvency of the guarantee fund for payment of claims, the corporation engaged in greater monitoring of builders at the point of registration and greater education and advice to builders. A targeted inspection programme was introduced in 1992. In addition, a claims database is being developed to track defects in building materials, and the Programme is "pursuing loss recovery options more aggressively" against builders owing money to the programme and identifying vendors who are selling new homes without being registered. There has been a large increase in charges laid under the Act for non-registration. In addition, the Corporation has used a rating system based on claims against a builder which consumers can check through a toll-free number.

The Home Warranty plan emerged against a background of major dissatisfaction with new housing during the period of the 1970s. It was probably regarded as an important goal by the industry to develop a better image with the public and the Warranties program may have given the larger more established companies greater control over small builders. Consumers of new homes may be generally middle-class and perhaps more likely to complain, particularly in relation to home defects. The spectacle of defective houses can have significant political effects

since this is not just any commodity, but is usually the most important purchase made by individuals. Even minor defects in such a large purchase are likely to lead many individuals to dissatisfaction and complaints.

(iii) Travel Industry Compensation Fund

This programme, established under the *Travel Industry Act*,¹³⁸ protects consumers who have not received travel services which they have paid for to a registered travel agent. Compensation is paid by a fund which is financed by compulsory fees paid by registered travel agents. The fund has not been sufficient to meet claims made on it and in 1990 the Province of Ontario provided a \$10 million loan guarantee. This guarantee remains in force and the Fund remains in a deficit position. Although the fund is subrogated to the rights of consumers it rarely recovers anything on the bankruptcy of the operator. Table 3 indicates the caseload of the Fund.

Table 3

| Year | # Claims Received | # Claims Allowed | # Claims Paid | Total Value Claims Paid | Average Payment |
|---------|-------------------|------------------|---------------|-------------------------|-----------------|
| 1992-93 | 7,013 | 6,196 | 5,963 | \$5,283,729 | \$886 |
| 1993-94 | 3,767 | 3,087 | 2,848 | \$2,143,163 | \$753 |

(iv) Ombuds

The Ombuds was developed as a means of addressing "maladministration" in public bureaucracies, responding to the concern that individuals might experience in achieving satisfaction from large bureaucracies, and providing an appeal to an independent third party. In Ontario, in 1994 the provincial ombuds received approximately 31,000 complaints and inquiries in relation to the operation of public bureaucracies. In Europe, the ombuds model has now been transplanted to the private sphere, particularly in the area of financial services, but also in relation to legal services. The European Commission suggested recently the possibility of establishing minimum standards for Ombuds on a Community wide basis.¹³⁹

The UK has experienced a large growth in ombuds over the past decade.¹⁴⁰ For example, in 1992, 10,000 complaints were made to the UK banking ombuds, and the Insurance Ombuds completed 1,915 cases in 1990. There are differing views on the success of these institutions but the following points may be made. There have been a proliferation of these institutions in the UK which have "piggybacked" on the Ombuds concept. There have therefore been calls for minimum standards in terms of independence from the particular industry, if consumers are to have confidence in the system. Second, consumers generally have to exhaust the internal complaints mechanisms of the company. Concern has been expressed by consumers about the

¹³⁸ R.S.O. 1990 c. T.19.

¹³⁹ See European Green paper.

¹⁴⁰ For useful reviews see C. Willett, "Ombudsman schemes in the United Kingdom's Financial Sector: the Insurance Ombudsman, the Banking Ombudsman and the Building Societies Ombudsman" (1994) 17 *Journal of Consumer Policy* 307 and articles cited in P.E. Morris "The Investment Ombudsman-A Critical Review" (1996) *Journal of Business Law* 1.

usefulness of these internal procedures established by the companies, with a majority of respondents in a government survey noting that "the internal complaints procedures which they had to exhaust before going to the ombudsman were a complete waste of time".¹⁴¹ Third, it is important that the Ombuds is independent of the industry and have the power to require the production of documents and make decisions which are binding on the companies involved. The success of these institutions does seem partly to be based on the calibre of the ombuds and their staff. Finally, there is currently some tension in the UK model between the role of complaint handling and the raising of standards. This reflects the tension mentioned above between the complaint mechanism as a "defuser" and as a valuable source of voice for organizational change.

The Ombuds model has a number of potentially attractive features. First, the ombuds may be able to play two important roles, achieving redress and identifying general issues which might result in changing industry practices. They can go beyond legal analysis and base decisions on good industry practice, perhaps stimulating reform. The Ombuds can act as the conscience of an industry.

In Canada, during the past decade there have been many complaints by both small business and individuals in relation to financial institutions and their apparently arbitrary treatment by bank bureaucracies.¹⁴² In response to these concerns the Standing Committee on Industry recommended in 1994 the creation of a banking ombuds. In addition, the 1991 Bank Act reforms required the establishment of complaint handling procedures for customers and the provision in consumer literature of the address of the Superintendent of Financial Institutions.¹⁴³ The superintendent is not however an Ombuds and has no power to make binding decisions in relation to individual disputes.

(c) CONCLUSION: CONSUMER REDRESS MECHANISMS

These consumer redress mechanisms may perform a modest role in diverting claims from the courts. They may also address problems which would not normally be taken to court, such as claims under the Home Warranties programme, and provide remedies which may not be available from a court. Compensation funds such as those developed under the Travel Industry Act and the Motor Vehicle Dealers Act should be studied further as models for low-cost-redress. The general growth of differing forms of consumer redress mechanisms over the past two decades suggests that it may be valuable to attempt to rationalise and establish minimum standards of fairness and expeditiousness. There should also be greater analysis of the avoidance of disputes through the use of bright-line rules which can be incorporated in standard-form contractual documents.

¹⁴¹ Office of Fair Trading, *Consumer redress Mechanisms: A report by the Director General of Fair Trading into Systems for resolving consumer complaints* (1991).

¹⁴² Most recently reflected in the Federal Department of Industry committee hearings on Small Business. See Department of Industry *Taking Care of Small Business* (1995).

¹⁴³ Bank Act S.C. 1991 c.46 as amended, ss. 455-456.

6. CONCLUSION

Policymaking in relation to small claims courts must be based on a solid empirical understanding of the role of the court. In Canada, there is a small, but growing academic literature on the court which has enhanced our understanding of the possibilities and limits of the court as a mechanism for providing access to justice. If there is to be intelligent policymaking by governments, then it is necessary that these studies be supplemented by the collection of meaningful statistics on the operation of the court. Unfortunately, this does not occur presently in Ontario. This affects seriously the level of public debate since individuals are unable to obtain information to make an informed assessment of these institutions.

Existing research indicates that small claims courts remain a limited form of access to justice for the ordinary individual. The courts continue to hear a relatively narrow range of cases brought by better educated, middle-income individuals as plaintiffs. It also remains part of the process of debt collection by organizations against individuals who may often be in lower-income or more precarious forms of employment. The research by McGuire and Macdonald in Montreal indicates a lack of use of the court by women and ethnic minorities. Policymakers must face the fact that the rhetoric of "The People's Court" is primarily rhetoric and assess seriously the role of small claims courts as part of a programme of access to justice. In particular, there must be some hard questions asked as to whether small claims courts contribute significantly to remedying power imbalances in society or address many of the problems of ordinary individuals. Administrative tribunals are often of more significance here and analysis of small claims courts must understand them against the background of these institutions.

In addition, in the area of consumption problems there have developed several forms of industry arbitrations which provide an alternative to the use of the small claims court and the court system. There should be easily available information which compares objectively the advantages and disadvantages of these systems so that consumers may make an informed consumer choice in relation to consumer redress. There should also be greater attention paid to the role of preventative law in this area e.g. rules which clearly establish the ground rules of a particular contract and avoid the need for litigation.

The small claims court has often been a site for experiments in civil justice. The role of mediation in these courts needs further scrutiny in Ontario in order to assess whether it meets the goals of expeditious and fair justice. In this context, there has always been some ambivalence as to whether small claims courts should simply be "speeded-up" versions of the higher courts or provide a real informal alternative to the traditional court system. There should be some further reflection on this general question and the specific question of who are likely to be the winners and losers in either alternative.

Finally, there will continue to remain controversy over what small claims courts are for, partly reflecting the political interests and ideologies of those most interested in the business of the court. If lower-income individuals and the general public are likely to lack knowledge and unlikely to organize effectively around court reform then one must be pessimistic about the long term success of the small claims court becoming a "people's court". This underscores once again the importance of accurate information on the business of the court and also the need for assessing alternative methods of providing access to justice.

SUMMARY OF FINDINGS AND RECOMMENDATIONS

1. SMALL CLAIMS COURTS: THE NEED FOR CONTEXT

Reforms to the Small Claims Court need to be made in the context of an understanding of its existing role and its relationship to other institutions. The court is neither a “people’s court” nor solely an engine of debt collection. There are two processes apparent in small claims court: (1) the debt-collection routine where a claim is part of the larger process of debt-collection by business organizations against individuals and (2) the disputed case. It is possible for the first category to slip into the second category but the distinction is a useful heuristic for analysis of policy making in relation to the court.

- (a) The court continues to have a large role in debt-collection by businesses against individuals who are likely to be drawn from lower-income groups and those in more precarious employment. The majority of these cases result in default judgments. Even in provinces where corporations cannot use the court, there is a significant percentage of collection work by unincorporated business. Significant percentages of individuals sued in debt actions may have defences against the claim but do not assert these defences.
- (b) Individuals are more frequently plaintiffs in disputed cases and these cases involve a significant percentage of consumer cases. If Vidmar is correct that approximately 33% of disputed cases relate to consumer issues (see above) then there may be as many as 10,000 - 15,000 of these cases annually in Ontario and approximately 5-7,000 trials. Disputed cases appear often to be between individuals and small businesses or between small businesses.
- (c) Individual plaintiffs tend to be male, professionals or self-employed, and better educated than the general population. Research in Montreal suggests a paucity of women and ethnic minorities as plaintiffs. In contrast, defendants in debt actions may be more likely to be drawn from blue-collar and more precarious forms of employment. The court is a “people’s court” primarily in terms of “the people” being processed as defendants in debt-collection actions.
- (d) Descriptions of the court as “the people’s court” need also to be tempered by the fact that administrative tribunals deal with many problems of “the people”, which may be of greater significance to everyday life than those addressed by the court. It is artificial to discuss resource allocation issues and the relative importance of small claims courts without putting them in the context of the role and importance of tribunals.
- (e) There appears to be a remarkable variability in approaches to adjudication by small claims court judges. Litigants will therefore experience different patterns of justice dependent on the particular approach of the judge. Since significant numbers of individuals are unrepresented there is little control over this discretion. This variability in role may reflect a deeper ambivalence as to the nature of the court and its role within the community.

- (f) There are also a number of industry-related, dispute mechanisms such as the automobile and new home warranty programme and there is interest in the concept of the Ombuds as a consumer redress mechanism. The role and performance of these institutions should be monitored so that, where appropriate, they may be compared to the performance of the small claims court. These industry arbitrations, apart from the new home warranty programme, have relatively limited caseloads compared to the small claims court.
- (g) The Ombuds has developed in Europe as a model for disputes between individuals and large organizations, particularly in the financial sector. Disputed cases in small claims courts are generally not between individuals and large businesses. It may be that the Ombuds model should be developed for disputes between individuals and large businesses and disputes between small and large businesses. The Ombuds may be able to achieve greater compliance than a court and also draw attention to systemic issues raised by complaints in a particular industry.
- (h) A current view of the court is that it should provide access to redress for both individuals and small businesses. This approach may be related to the current nature of the economy where there are larger numbers of self-employed and small businesses, whose market position may not be vastly different from an individual consumer. US research does not indicate that the presence of corporate claimants in small claims courts results in fewer filings per 100,000 of the population than in those states where corporations may not sue in small claims court.
- (i) The small claims court does not appear to provide expeditious access to justice in urban areas. It is approximately six months between filing and trial. This is a longer period than most US small claims courts.
- (j) A substantial percentage of litigants are represented by lawyers or para-legal personnel in disputed cases. There is some evidence of a bias against unrepresented defendants.

2. POLICY MAKING AND THE SMALL CLAIMS COURT: A MODEL OF RESPONSIVENESS

The Political Economy of the Small Claims Court

There are several interest groups associated with the small claims court. The users may be divided into the repeat-players (generally credit granting institutions) and one-shotter plaintiffs such as small business and consumers and debtor defendants. Other interest groups include lawyers and para-legals, judges and administrators. There is not a "small claims bar" similar to the personal injury bar and there are few full-time judiciary. Ministry officials associated with the administration of the court appear to have continuing relations with repeat users of the court, such as associations of debt collectors.

If we assume that concentrated groups in the political process obtain tangible benefits and diffuse and less organized groups tend to gain at best symbolic rewards then we can see perhaps how the small claims court is able to sustain the image of the court for the "average individual" while at the same time presenting more tangible rewards to repeat users. For many one-shotters whether business or individuals, encounters with the court may not achieve their objectives, in particular collection of a judgment.

Policy making should at least aim for greater transparency on the actual operation of the court. This might be partly achieved by the collection of more meaningful data and the

development of performance standards. (See below 2(b) and (c)) Assuming this information is widely available, it might allow a more informed choice to be made by one-shotter users of the court.

(a) Organization and management of Small Claims Court

Much rhetoric surrounding the court emphasizes its role as a public service for the ordinary person. There are many important policy questions relating to the continuing operation and management of the courts. At present these are often undertaken by a Rules Committee which is currently composed of lawyers, judges and administrators from the Ministry of the Attorney General. There are no para-legal representatives on this committee and no lay representation. The current committee is composed entirely of white males. This is not a criticism of these individuals. But it raises questions as to the extent to which the administration of these courts has attempted to be truly responsive to the needs of all those who are affected by its activity.

(b) Information for Policy Making: The Need for Relevant Court Statistics

The Interim Report of the Civil Justice Review has already commented on the limitations of existing court statistics. Data on the small claims court are no exception to these criticisms. The current statistics on the operation of the small claims courts do not provide meaningful information on many important aspects of the work of the court. Given the current method of data collection it is not possible to provide accurate data on such issues as the processing time for contested and uncontested cases or the percentage of cases filed which result in default judgments or go to trial. There are no data on the nature of court users or the types of cases processed in the small claims court.

This is a central issue for reform. It would be irresponsible to extend the jurisdiction of the small claims court without establishing accurate baseline data on the current operations of the court. Without these data any statement on the impact of reform will be of little value. British Columbia has begun this process by its evaluation of the small claims court reform.

The establishment of continuing data on the performance of the court is not only of technical significance. It could have a modest democratizing influence on discussions concerning the operation of the courts. Individuals would not have to rely solely on the anecdotes of those involved in the process in order to gain an understanding of the impact of the court's work.

In reviewing the empirical literature on small claims court I was struck by the important contributions which careful academic studies have made to public policy debate. There is now a modest base of studies in Canada which allows us to develop more refined questions about the role of the court. The Ministry of the Attorney General should consider developing a continuing research capability in cooperation with academic institutions.

There is also a need for greater knowledge on why individuals turn to the small claims courts as a resource in disputes and why individuals do not turn to the courts. Without this information it is difficult to conclude whether there is an access problem which is met by increasing the availability of small claims court actions.

(c) Performance standards

There should be performance standards for the disposition of small claims cases. Individuals should be given information on these when they file claims. There should be periodic attempts to measure the quality of service provided by the various personnel in these courts. This could include the use of anonymous questionnaires to litigants.

(d) Access to the Court: A Consumer Perspective

The small claims courts are intended to be a consumer service. Individuals faced with legal action or thinking about legal action in the small claims court have limited sources of advice on their problems. Lawyers have shown little interest in the types of problems dealt with by small claims courts and para-legals represent primarily business interests. Few legal clinics deal with debt or consumer problems. Credit counselling services may provide some advice here but there are no institutions similar to the UK Citizens Advice Bureaux and there are no longer any regional Consumer Advice Centres. This could mean that individuals who do not have access to networks of knowledge (e.g. friends who are lawyers) may either simply "lump it" or commence an action in court which might not have been necessary, had they been properly advised.

There is currently information available in English/French on the court and the Ministry of the Attorney General has developed a video on using the Small Claims Court. However, there are no guides to the court in the principal ethnic languages relevant to a particular area and there has been no attempt to provide court documents or interpretation services in languages other than English or French.

Experiments should be conducted in providing this information through electronic kiosks in shopping malls, community centres, libraries. Interactive software could be developed which could be accessed in these locations.

Information should be available on the alternative options available so that consumers can make informed choices between using the court or an industry arbitration scheme. This would include samples of the typical time taken by each process and some of the advantages and disadvantages of each process as represented by representative cases. This might promote competition in the process of dispute settlement.

3. JURISDICTION

If it is proposed to raise the jurisdiction of the small claims court, it is imperative that there be a proper attempt to study the impact of these changes through a systematic empirical analysis of the business of the court. Current data collected by the Ministry are inadequate to make an informed assessment of the impact of changes in the jurisdiction of the court.

The study will require a baseline study to examine the existing business of the Small Claims courts and an analysis of the impact of the changes. This should involve research at a minimum of three urban and rural sites.

(a) Jurisdiction raised to \$10,000 or \$15,000

An increase in jurisdiction to \$10,000 or \$15,000 raises fundamental questions about the objectives of small claims courts. Are they to be regarded as a real alternative to the higher courts or are they simply a more informal version of the higher courts? This question has never been faced squarely in Ontario. In consequence, there has been no ideal by which to measure the success or failure of the court and the court simply adapts to the various demands of its users. My impression is that it is slowly being integrated more fully into the existing court system and an increase in jurisdiction is likely to accelerate this trend and result in greater formality, with the court functioning as a speeded-up version of the higher courts.

The potential implications of an increase in jurisdiction are:

- (1) It would include a significant number of disputes which are high on the list of consumer complaints to the Ministry of Consumer and Commercial Relations, namely home repairs, major automobile repairs and some automobile purchases. It would also include many small business disputes.
- (2) Approximately one third of cases commenced in the General Division are for amounts under \$10,000. It would probably result in a significant transfer of business from the General Division. Many of these cases may be debt collection matters and it is unclear whether this transfer would affect trial rates in the General Division. In addition, based on the British Columbia experience, there may be a large number of new claims.
- (3) It is possible that there may be more defences filed in those cases which transfer to the more user-friendly environment of the small claims court. This should be encouraged by reforms to the process of debt-collection. On the other hand the increase in jurisdiction may lead to greater formality.
- (4) Statistical data suggests that there is a decrease in claims under \$1000 and \$500 when there is an increase in jurisdiction. Given the limitations of existing data one can only speculate as to the reasons for this phenomenon. It suggests however that thought might be given to introducing a simplified arbitration procedure within the enlarged jurisdiction restricted to individual claims or situations where an individual is disputing a business claim.
- (5) Mediation might be institutionalized with the increase in jurisdiction. The existing pre-trial hearing serves several objectives and is not solely a process of mediation. Introduction of mediation could permit the courts to use volunteer mediators drawn from the community.

(b) Territorial Jurisdiction

Individuals are disadvantaged by current rules which allow organizations to sue in distant venues. Debt-collection against individuals should *prima facie* be in the defendant's home community or information should be provided on all statements of claim which allow an individual to make a simple application to change jurisdiction.

4. THE ROLE OF MEDIATION

There is some empirical support for the argument that mediated outcomes are perceived as fairer and participants show greater satisfaction with the process than with adjudication. It is not clear what the impact of mediation is on the unrepresented individual defendant. There is less support for the hypothesis that mediation results in greater compliance. Mediation is only likely to reduce costs and delay if volunteer mediators are used.

Existing pre-trial procedures in Ontario and British Columbia serve a variety of purposes, in addition to acting as a focus for mediation. Reforms should ensure that individuals are not confused as to the nature of the process. Individuals should be provided with full and realistic information on the choice between mediation and adjudication. Courts should experiment with volunteer mediators who have undertaken training in mediation. These mediators would not be required to be lawyers.

There should be caution in making sweeping statements concerning the role of mediation in small claims courts. The nature of mediation and the role and qualifications of the mediators

may vary between courts and there may be less distinction between the processes of adjudication and mediation in small claim courts than in higher courts.

5. ADJUDICATORS

There is evidence that full-time judges (apart from those specifically appointed to the court) do not relish small claims court work. Part-time judges and lay justice have a long tradition in relation to the small claims court. At the same time the current practice of appointment and training of part-time judges is unsatisfactory and needs reform.

There should be greater imagination in the appointment and training of small claims judges. There is no reason why secondment to this court for two or three years could not be an attractive option for younger members of the bar. This would prevent "burn-out" and ensure that judges were more flexible in their approach which would fit with the ideals of the small claims court. There could develop a cadre of judges supplemented by volunteer mediators.

6. SMALL CLAIMS COURTS AND CONSUMER CLAIMS

It is unlikely that reforms to small claims courts will have a major redistributive impact on relations between producers and consumers. Indeed, extension of access for consumer claims may be a symbolic gesture which substitutes for measures which might have a direct impact on the marketplace.

- (a) There should be greater policy analysis of the relationship between the specificity of rulemaking and the avoidance of disputes in areas where there are significant levels of consumer dissatisfaction. There is no analysis, for example, of the impact of the Motor Vehicle Repair Act and its use of the sanction of nullity on the number of disputes concerning automobile repairs.
- (b) Consumer legislation should contain an impact statement on how it is likely to affect the level of consumer disputes and consumer problem solving at the level of two-party negotiation, where the vast majority of consumer disputes are settled. Little is known about problem-solving in lower-income consumer markets.
- (c) There should be independent audits of industry redress mechanisms on issues such as openness, fairness, accessibility, expeditiousness. These audits should also attempt to measure the impact of the mechanism on bargaining and settlement by consumers.
- (d) The Home Warranty programme and the Travel Insurance Compensation Fund should be analysed systematically as potential models for consumer redress.
- (e) The Ombuds may be a model for dispute settlement between individuals and large bureaucracies.

7. SMALL CLAIMS COURTS AND DEBT COLLECTION

- (a) Data should be generated on the extent to which particular types of business creditors continue to use the small claims courts and their reasons for doing so. In the light of this data it may be possible to generate differential pricing structures and/or incentives to develop alternative methods of collection.
- (b) Individual plaintiffs with unpaid judgments against businesses should be encouraged, through enforcement information material, to notify the Ministry of Consumer and Commercial Relations concerning the judgment. These data could feed into the

licensing activity of the Ministry, lead to higher levels of redress and provide data on rogue businesses.

- (c) Credit enforcement measures such as default notices should contain warnings and information similar to those under the UK Consumer Credit Act.
- (d) All statements of claim should contain in plain language (1) A warning about the importance of taking action in response to claim (not merely stating that judgment may be awarded against them) (2) Lists of possible sources of advice, telephone numbers (clinics, credit counselling) and lists of possible defences to an action (3) The telephone number of the court which issued the claim.

8. ADVICE IN COURT

- (a) Earlier experiments with the use of duty counsel in small claims courts should be extended. This could be a valuable experience for a student lawyer or an articling student. This should be further pursued particularly in urban courts which have significant levels of debt work. There should be permanent advice centres in larger courts.
- (b) There should be greater opportunities for para-legals, law students and clerks to provide legal advice in small claims courts. In Quebec there is a para-legal advice service available in the court. There should be efforts made to ensure that the needs of both defendants and plaintiffs are catered for.

9. STUDY OF RURAL COURTS

There is little systematic data about issues of access to justice and small claims courts in rural areas of Ontario. This should be part of a baseline study before changes in the jurisdiction are introduced.

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TOPIC VI

ENHANCING THE PERFORMANCE OF THE ADMINISTRATIVE JUSTICE SYSTEM

FUNDAMENTAL REFORMS TO THE ONTARIO ADMINISTRATIVE JUSTICE SYSTEM

MARGOT D. PRIEST

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FUNDAMENTAL REFORMS TO THE ONTARIO ADMINISTRATIVE JUSTICE SYSTEM

MARGOT D. PRIEST

1. OVERVIEW OF THE ONTARIO ADMINISTRATIVE JUSTICE SYSTEM

(a) INTRODUCTION

The mandate of the Civil Justice Review is to develop an overall strategy for the civil justice system. The objective is to provide a speedier, more streamlined and more efficient structure that will maximize the effective use of public resources allocated to civil justice.¹ The Fundamental Issues Group of the Review is examining issues with longer range implications for the civil justice system. The examination will include "alternatives to the courts which may offer attributes such as specialized expertise, informality, and privacy."²

Administrative tribunals are, of course, institutions that are not courts but that deal with individual rights and benefits, decide disputes and determine obligations. In some cases, they have a broad "public interest" mandate that goes beyond the interests of the individual parties in the case. The tribunals were often established in order to apply specialized expertise to decision-making or to allow for more informal or less "judicialized" procedures. In rare cases, such as the Social Assistance Review Board, they were structured to provide for maximum privacy for the applicants. The agencies that are part of the Ontario administrative justice system are, in some cases, clear alternatives to the courts. In other cases, they are best viewed as complements to the courts. In all cases, the courts supervise the administrative justice system through judicial reviews or appeals.

While the Civil Justice Review's primary focus is on the courts and their perceived shortcomings of delay, expense, and formality, the administrative justice system agencies are also subject to criticism. An examination of administrative tribunals in the context of the Civil Justice Review must be carried out with an awareness of their strengths and shortcomings. At the same time, the examination must take account of the large number of reforms that are now being implemented, with greater or lesser degrees of success. This context of reform and change allows one to focus more sharply on the remaining areas where reform is critical if the administrative justice system is to function effectively and serve the citizens of Ontario well.

This study will address the question of what fundamental reforms can be made to the administrative structure or processes of administrative justice system boards and agencies in order to reduce delay or costs, improve the quality of decision-making, or enhance access to justice. Part I sets out an overview of the existing state of the Ontario administrative justice system. While the system's approximately eighty-two tribunals, boards, agencies and commissions have an immense effect on the lives of citizens, they are relatively unknown. Many citizens never hear of a particular board or tribunal until its powers noticeably impinge on their day-to-day lives. The number of agencies and the narrowness of their jurisdiction in comparison to the courts are a source of confusion and frustration to many citizens; their role

¹ Taken from Ontario Civil Justice Review, Terms of Reference, April 5, 1994.

² Ontario Civil Justice Review, Fundamental Issues Group, April 19, 1994.

is often poorly understood. Unfortunately, even lawyers or government officials who should be more familiar with this part of the justice system do not fully appreciate its dimensions or workings.

Part I begins with a brief examination of the administrative justice system, the role played by quasi-judicial bodies, and the rationale for their creation. It continues with a survey of the studies and recommendations for reform of agencies in Ontario and selected other jurisdictions. The number of studies and the consistency of their recommendations are striking. The paper then describes the environment in which Ontario agencies are operating. This includes the formation of the Society of Ontario Adjudicators and Regulators, the reforms initiated by the agencies, and the work being done by Management Board in the Agency Reform Project.³

The reforms initiated by the agency community and the government reflect and respond to the problems facing the system and individual agencies. The reforms also give an indication of the potential range of solutions that might be pursued. The relative flexibility of agencies in comparison to courts has allowed a number of options for change to be explored. This is an important characteristic of the system at this time. In the past five years, internal reforms have changed the ways in which a number of agencies carry on their business, and several government reform initiatives indicate a potential for further important changes. In some cases, any fundamental reforms of the administrative justice system that may be recommended by the Civil Justice Review would involve the enhancement or institutionalization of existing reform initiatives. In other cases, completely new solutions are required.

Part II profiles five of these administrative justice system agencies: the Social Assistance Review Board; the Criminal Injuries Compensation Board; the Workers Compensation Board and the Workers' Compensation Appeals Tribunal; the Ontario Insurance Commission; and the Human Rights Commission and the Board of Inquiry. It also looks at adjudicators in the Office of Adjudication of the Employment Standards Administration of the Ministry of Labour. Some of the broader issues and concerns raised by the mandate, structure or operation of these six bodies (i.e., five agencies and the one ministry group) will be identified for later discussion in the context of suggestions for more general reform.

Part III examines the relationship of the administrative justice system agencies to other institutions, including the government, the courts, and the Ombudsman. The agencies are creatures of the legislature and, to some degree, the term "agency" reflects their roles of performing functions on behalf of the government. The administrative justice system, however, is an important part of the justice system in Ontario as a whole. The decisions of these agencies affect as many, if not more, citizens than do those of the courts. The agencies are supervised by the courts through judicial review and, in some cases, through appeal provisions. A quick survey of the appeal provisions in various agency enabling statutes indicates their variety and the lack of a common government policy toward appeals. The Ombudsman in Ontario also plays a role in relation to administrative justice system agencies, reviewing not only process and procedure, but also substantive decisions.

Part IV draws some conclusions about the administrative justice system based on the material in the preceding sections and identifies some of the challenges facing the system. One important conclusion is that the various agencies, boards, commissions and tribunals deciding rights and obligations of persons in Ontario do make up an administrative justice

³ The information in this paper is current to October, 1995.

system. There has been, however, a lack of government commitment to the maintenance and improvement of this system. In part, this is due to the view that agencies are *ad hoc* bodies that are part of ministry fiefdoms. In part, it has been due to a tendency to dismiss their importance by relegating them to the arena of political patronage and pork barrelling. The agencies themselves have responded with "self-help" by instituting various reforms. The next challenge is to institutionalize these reforms. The current reform work of the agencies is vulnerable since it is based on the efforts of volunteers working without adequate funding or government support. All future reform efforts, however, will take place in an environment of cost-cutting and resource reduction. It is suggested that implementation of reform is not necessarily incompatible with budgetary constraints, but it does require a longer term view for the establishment of an effective administrative justice system.

Part V deals with some of the fundamental reforms that are required for an efficient and fair administrative justice system. It begins with an examination of several issues related to the better management of administrative justice system, such as the use of generic hearings, rule-making powers, the use of mediation or other processes to encourage settlements, and other flexible or informal decision-making processes. Part V then looks at changes that should be made to the structure of the system, including appointments. The existing appointment process is one of the greatest weaknesses in the administrative justice system and is at the base of a number of other problems in the system, including a lack of government commitment to its reform. Reforming the appointment process is therefore critical to overall reforms to the system.

The establishment of an Administrative Justice System Council is discussed in Part V to deal with certain matters, including discipline and appraisals of agency members. The role of the civil courts in the administrative justice system is also examined. This includes a review of the role of judicial review, the rationale and processes for appeals, and the question of whether reform is needed to the Divisional Court.

In terms of the better management of the system, Part V also reviews the arguments for the rationalization of agencies, including combining or eliminating some agencies. This is attractive because of the connotations of cost reduction, but if pursued with the objectives of more efficient and fairer fulfillment of mandate rather than simple cost reduction, the rationalization can be a vital part of reform.

Finally, Part V examines some questions that need to be discussed in the implementation of any fundamental reforms to the administrative justice system. What is perceived as a "fair" procedure? How many levels of appeal are required to treat citizens fairly? The final and crucial question is, why does the reputation of the system matter? Some of the reforms to the system require a broader rethinking of government policies and administrative system, not merely "band aid" changes to agency procedures. Furthermore, it is important that governments recognize that interactions with citizens, which frequently take place in administrative justice system agencies, affect how citizens view government as a whole and compliance with laws in general. At a time when governments everywhere are concerned about a loss of trust and respect of the governed, the process of government and the exercise of government power must be carried out with dignity and integrity.

The paper concludes with a summary of recommendations for fundamental reforms to the Ontario administrative justice system.

(b) ONTARIO BOARDS AND AGENCIES

(i) General Overview

There are approximately 211 arm's length agencies in Ontario, eighty-two of which are designated as being "regulatory."⁴ The primary function of these "regulatory" agencies is to regulate or adjudicate on the rights and entitlements between individuals (including corporations) or between individuals and the state. They have a wide variety of mandates and adjudicate pursuant to a large number of statutes.⁵ Some broad groupings are possible, however.

A number of administrative justice system agencies hear appeals from decisions made by ministry officials. These appellate bodies include the Social Assistance Review Board (family benefit entitlements), the Licence Suspension Appeal Board (drivers' licences), the Environmental Appeal Board (enforcement orders), and the Health Services Appeal Board (OHIP eligibility). A few, such as the Social Assistance Review Board (general welfare entitlements), the Fire Code Commission (orders by Fire Marshall), and the Assessment Review Board (property taxes), hear appeals from municipal officials. In some cases, appeals from another independent body are heard; for example, the Workers' Compensation Appeals Tribunal deals with decisions made by the officials in the Workers' Compensation Board, and part of the Ontario Municipal Board's mandate is to hear appeals from the Assessment Review Board. The Ontario Securities Commission hears appeals from the decisions of recognized self-regulatory organizations, such as The Toronto Stock Exchange.

Some of the agencies are adjudicators of first instance. In general, the jurisdiction of licensing bodies, such as the Liquor Licence Board of Ontario and the Ontario Highway Transport Board, is triggered by an application for a licence. Not all licensing functions are found in regulatory tribunals since many licences are granted by ministry officials. Refusals or suspensions of licences, however, may often be appealed to an independent tribunal (e.g., the Commercial Registration Appeals Tribunal). In general, licences that enable their holders to gain a significant monetary benefit, such as a monopoly franchise, are granted by independent bodies and not by ministry officials.⁶

Economic regulation of a particular industry sector, such as energy or securities markets, is generally carried out by an agency whose jurisdiction is triggered both by specific applications

⁴ The "regulatory" agencies are designated as Schedule I agencies pursuant to s. 3 of the *Management Board of Cabinet Act*, R.S.O. 1990, c. M.1. The other agencies are "advisory" or "operating" agencies (Schedules II, II, IV and some Schedule I) and are not considered to be part of the administrative justice system. These other agencies would include, for example, the Art Gallery of Ontario, TV Ontario, Ontario Hydro, and the Liquor Control Board of Ontario. The scheduling reflects the relative independence and reliance on the Consolidated Revenue Fund of the agencies. The Public Appointments Secretariat publication, *Guide to Agencies, Boards and Commissions*, lists all bodies to which order-in-council appointments may be made; most of these entities are not part of the administrative justice system. They include, for example, the governing bodies of universities, the public appointments made to the Board of Governors of The Toronto Stock Exchange, boards of directors of crown corporations, and appointments to a number of advisory bodies.

⁵ There is, to my knowledge, no exact count of Ontario statutes that empower agencies to adjudicate. The Ontario Municipal Board, however, has jurisdiction under approximately 150 acts; the Health Professions Board regulates twenty-three professions under twenty-one acts; the Mining and Lands Commissioner deals with over 100 statutes; and the Ontario Labour Relations Board hears disputes under fifteen acts.

⁶ The rationale for the creation of independent administrative adjudicators will be discussed further, below.

and on the tribunal's own initiative. Most licensing agencies, for example, are passive; they wait for applications on which they then adjudicate. In contrast, the industry regulators, such as the Ontario Energy Board and the Ontario Securities Commission, are empowered to undertake investigations or initiate proceedings at their own discretion. The Ontario Securities Commission has recently been granted a power that is unusual in Ontario: it can make legally binding rules in a number of substantive areas.

There is also a group of agencies that determine entitlements to compensation funds. In some cases, the agency hears appeals from a ministry decision-maker (Commercial Registration Appeals Tribunal), and in other cases, the agency is the initial decision-maker (Criminal Injuries Compensation Board). The Ontario Insurance Commission (personal injuries from automobile accidents) and the Crop Insurance Arbitration Board (crop losses) settle disputes relating to insurance claims.

About fifty-five of the eighty-two "regulatory" agencies are specifically authorized by statute to hold hearings.⁷ Others must look to the rules of natural justice or fairness to determine their dispute settlement practice. The Management Board Agency Reform Project estimates that the administrative justice system agencies costs approximately \$185 million a year to operate.⁸ Approximately 1,600 people are employed as staff and full-time appointees. The cost of the administrative justice system is greater than that of the civil justice system.⁹

At first glance, the administrative justice system agencies in Ontario appear to be a disparate collection of bodies established without a coherent rationale or purpose. In fact, there are a number of commonalties among the agencies, and their members share a set of similar concerns. There are even stronger commonalties among some "families" of agencies, for example, the tribunals dealing with labour and workers' rights or tribunals dealing with equity issues. Potential reforms include a rationalization of tribunals to allow various degrees of integration of the individual mandates of families of agencies. Even where tribunals have distinctly different mandates, however, there are common concerns and common processes within the administrative justice system as a whole. Indications of this are found in the reforms that are currently being implemented across a number of sectors and in the cooperation among the agencies in pursuing these reforms.

⁷ Estimate provided by Management Board Agency Reform Project. Those agencies that are authorized or required to hold a hearing are governed by the requirements of the *Statutory Powers Procedure Act* unless exempted. A few ministry officials are also empowered by statute to hold hearings; for example, the Registrar of Motor Vehicles should hold hearings pursuant to the *Highway Traffic Act* and the adjudicators in the Office of Adjudication in the Ministry of Labour hold hearings pursuant to the *Occupational Health and Safety Act* and the *Employment Standards Act*.

⁸ This estimate was calculated by adding the budgets of the various "regulatory" agencies provided in the Estimates. It does not fully reflect all costs, since in some cases accommodations or other services are provided by associated ministries or the Ontario Realty Corporation. Approximately \$62 million of the \$185 million in agency budgets is recovered through user fees, industry levies, licence fees, etc. In addition to covering the costs of several of the agencies, these fees contribute a substantial additional amount to the Consolidated Revenue Fund (e.g., the Ontario Securities Commission's budget is approximately \$21 million, but the securities industry pays approximately \$50 million in fees which go to the CRF).

⁹ The Courts Administration Division of the Ministry of the Attorney General had a budget of \$276 million in 1993-94; this figure did not include the salaries of the federally appointed judges, but did include the costs of administering the criminal justice system. Sources in the Ministry of the Attorney General estimate that more than half the costs can be attributed to the criminal justice system.

The individualized mandates of the agencies may also distract observers from the fact that they are parts of a single system—the administrative justice system. It is conceptually easier to think of courts as a comprehensive justice system because they are established as single bodies, although they hear a wide variety of issues and rights created under a number of statutes or common law legal regimes. The courts have common procedures and structures, while the agencies are more idiosyncratic. Indeed, since the agencies were created at different times and for different reasons, there is a degree of individuality in their structures and mandates that cannot be explained by legal or policy reasons. In some cases, these variances have allowed for experimentation or comparison of different ways of fulfilling an adjudicative mandate. In other cases, however, the variances merely serve to confuse or complicate the picture.

Nonetheless, the aggregation of tribunals forms a system that is part of our larger system of justice in this country. While specific tribunals are specialized and have jurisdictions that are limited by their enabling acts, they form a comprehensive group dealing with the relationship of persons with each other and with the state. It is only by thinking of this aggregation as a system that the common interests, concerns and reforms can be adequately identified and pursued.

It is also helpful to think of the administrative justice system agencies as a system because of the immense influence they have on the lives of citizens. For most citizens, the administrative justice system will have a greater direct effect on their lives and well-being than the court system. For many, it is the primary form of contact with the State and, therefore, can embody the State in the minds of these citizens. A well-run, effective, and responsive administrative justice system is a hallmark of a responsive and democratic society. It affects the perception of citizens that they live in a society that considers their needs and under a government that deserves their respect and compliance.

(ii) Why Was an Administrative Justice System Created?

The administrative justice system can trace its origins back hundreds of years to specialized courts and tribunals. The value of a specialized or expert decision-maker has long been recognized. The modern administrative agency, however, dates from the latter half of the 19th Century and the first agencies dealt with economic regulation.¹⁰ The Ontario Railway and Municipal Board was the first of the major Ontario agencies, being formed about 1890. It took over extended responsibility for telephone regulation in 1914 and was given broader transportation powers in the 1930's. Both the Ontario Highway Transport Board and the Ontario Telephone Service Commission were split off from the Railway and Municipal Board in 1954. The Securities Commission dates from 1930, receiving its current name in 1933.

It must be recognized that the mandates of these bodies have not remained static. Certain responsibilities have been shifted between departments or ministries and the agencies. The Ontario Railway and Municipal Board, for example, was responsible for setting technical standards for telephone communication; this is now a responsibility of a (federal) department. Major new responsibilities have been added as the ambit of regulation has changed (e.g., the

¹⁰ J. Benidickson, "The Canadian Board of Railway Commissioners: Regulation, Policy and Legal Process at the Turn-of-the-Century," 36 *McGill L.J.* 1222; D.J. Mullan, "Administrative Tribunals: Their Evolution in Canada from 1945 to 1984," in I. Bernier and A. Lajoie, eds., *Regulations, Crown Corporations and Administrative Tribunals* (Toronto: University of Toronto Press, 1985); H. W. Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in 19th-Century England* (Toronto: U. of Toronto Press, 1985).

introduction of insider trading or takeover bid regulation) or the political and social standards change (e.g., broadening of workers' compensation to include chronic pain or stress from harassment). Furthermore, agencies were not usually established for a single reason, but rather there was an interplay of factors that made the establishment of an agency appropriate or convenient. An impartial and expert body may have been required or there may have been a large caseload that should be dealt with in a nonpolitical environment. Some generalizations are possible, however.

The economic regulatory agencies, such as the Ontario Energy Board or the National Transportation Agency, were generally organized in order to separate certain decisions from the political process, at least to some degree, and to place the decision-making power in the hands of experts. The government, in establishing these bodies, was making a choice between a departmental/political decision-maker and a separate expert body. The original federal Board of Railway Commissioners, for example, had been comprised of four Cabinet Ministers; experience indicated that an independent and expert body was preferable, although a high degree of political control was maintained though a provision for review by Cabinet of the Board's decisions.

These economic agencies were not usually developed to divert matters from courts; they diverted decisions from politicians and bureaucrats. They provided a disinterested process free from perceived interference by partisan interests. At the same time, they removed controversial and emotionally charged matters from the political domain. In making their decisions, these agencies often apply a "public interest" criterion that does not necessarily coincide with the interests of the parties in the case.

Although the courts did not generally play an important historical role in the areas in which these particular agencies regulate, e.g., in setting rail rates, the agencies may now be dealing with matters that previously had been enforced directly in the courts. Rights of action were not removed from the courts, but the regulatory agency became the usual forum for enforcement. For example, the obligations of common carriage were enforced by regulators using common law principles elaborated by legislation. Few complaints were taken directly to the courts after the transportation and communications regulatory regimes matured. Similarly, as securities regulation became more sophisticated, the legislation was increasingly aimed at preventing fraud and misrepresentation. The Securities Commission then enforced prophylactic regulation, refusing to approve inadequate prospectuses or to register dishonest dealers. Civil tort actions remain, however, as well as the *Criminal Code* provisions dealing with securities and classic fraud.¹¹

In contrast, another group of agencies, the labour boards, was developed specifically to remove decision-making from the courts. The Ontario Labour Relations Board was created in 1943 to replace a short-lived special labour court that had insisted on the same procedures and rules of evidence used in civil cases. The enabling legislation of labour boards contains privative clauses that restrict the role of the courts to the greatest degree possible. This has been the source of a certain mystique about the expert nature of labour boards, and it accounts for much of the caselaw dealing with judicial review of administrative bodies. Few, if any,

¹¹ Prosecutions taken under the *Provincial Offences Act* for violations of regulatory statutes, such as the *Securities Act*, may also be an important part of the regulatory enforcement structure.

nonlabour-related agencies have such privative clauses, which allow the labour boards to occupy a unique niche.¹²

The establishment of an agency allowed for the appointment of experts who were not necessarily lawyers. In the case of labour boards, it allowed for a structure that permitted specialized viewpoints to be represented in the decisions. The tripartite tribunal structure is also found in labour-related tribunals, including recently organized agencies, such as the Pay Equity Commission.¹³ A structure that allows for decision-makers with various skills and backgrounds has proven to be particularly important in the environmental area and, to some degree, in areas of economic regulation. Scientists, economists, accountants, engineers and other specialists, in addition to lawyers, can bring their expertise to bear on decisions. The criteria for decision-making and the type of evidence presented to these tribunals tend to be quite different from the courts.

In some cases, agencies have been established both to remove a process from the general administrative decision-making of a ministry (e.g., to provide an appeal forum for bureaucratic decisions) and to handle a large caseload. These agencies are also intended to provide a speedier and perhaps more informal process than the courts. The Social Assistance Review Board is an example. Even in cases where most decisions are made by bureaucrats, there may be also be a political sensitivity surrounding selected decisions that makes appeals to an independent body attractive. An example is the federal Immigration and Refugee Board.

In a certain sense, the administrative justice system can be viewed as being separate from the general body of government ministries and departments, while at the same time being a layer that often deals with decisions that were taken at first instance within a government ministry or with policies developed within a ministry. The processes and rationales for decisions in agencies are more public and transparent than most of those in ministries.

The procedures draw upon those developed by the courts, but are not identical. Being a creature of statute, an administrative tribunal is limited in its powers (i.e., only those given by statute or inherently necessary to perform a function). At the same time, however, it can be created to be flexible and innovative. The administrative justice system agencies, for example, are rarely required to apply the same rules of evidence as the courts. Official notice can be taken of a broader range of matters than in the courts. The adjudicator can play a more active role than a judge, demanding information, asking questions, seeking explanations. A greater emphasis can be placed on seeking the appropriate or "correct" result rather than following the correct procedure.

Since the administrative justice system is a statutory creation, many of the reforms to the system will be legislative. Since it has developed in an *ad hoc* fashion with individual statutes for each tribunal (and many tribunals being responsible for multiple statutes), the legislative solution to many problems will require a high degree of commitment and coordination from the government. This may account for the fact that many of the reform proposals described below have not been implemented and that most of the reforms being pursued by the agencies themselves or by the Management Board Secretariat reach a legislative wall beyond which they cannot pass without broader government action.

¹² The decisions of the Ontario Railway and Municipal Board were protected with a privative clause in its earlier years; this may be compared to the variety of appeals to which it is now subject.

¹³ The enabling acts of other agencies may require the appointment of representatives of certain constituencies, such as farmers or consumers. The Lay Benchers are an example.

(c) **PREVIOUS EXAMINATIONS OF THE ONTARIO ADMINISTRATIVE JUSTICE SYSTEM**

(i) **The Royal Commission Inquiry into Civil Rights (McRuer Commission) (1968)**

The McRuer Commission (the Royal Commission Inquiry into Civil Rights) was established to examine, among other matters, how far boards, commissions and other bodies might be encroaching on the personal freedoms, rights and liberties of citizens.¹⁴ Over a hundred recommendations were made dealing with the exercise of administrative and judicial powers of decision. The *Statutory Powers Procedure Act (SPPA)* and the *Judicial Review Procedure Act*¹⁵ enshrined many of these recommendations into law and influenced the formal tone that has characterized administrative proceedings in Ontario in past years. Although the McRuer recommendations were criticized,¹⁶ their content now appears unexceptional. The original *SPPA* provided, for example, that notice must be given of the subject matter, time and place of a hearing. The decision must be provided to the parties in writing and they can request reasons in writing. The *SPPA* went further than the jurisprudence of the time, giving broad rights of cross-examination and ensuring that parties could be represented by agents or by counsel. On the whole, the principles of the McRuer Report have become entrenched in the procedures of Ontario agencies. As reforms initiated by the agencies indicate, however, agency procedures that are drawn from the courts do not necessarily have to impose a court-like judicial structure on agency proceedings.

(ii) **The Ontario Economic Council (1978)**

The Ontario Economic Council made several recommendations relating to regulatory agencies in a report published in 1978.¹⁷ The Council recommended that the objectives of all regulatory agencies and the criteria by which agency performance could be judged should be clearly set out. All regulatory agencies should also submit annual reports to a standing committee of the Legislative Assembly. The reports should address how well an agency's objectives have been met.

(iii) **The Management Board Secretariat (1983)**

The Management Board Secretariat studied the classification, relationship to government, and control of various agencies. The schedules found in the Management Board Directives and Guidelines are the result of this study. Most of the agencies in the administrative justice system are found in Schedule I, as "regulatory" agencies. The division of agencies and the consequent level of government control reflect their degree of reliance on the Consolidated Revenue Fund

¹⁴ *Report No. 1*, Vol. 1, (Toronto: Frank Fogg, Queen's Printer, 1968) at 1.

¹⁵ R.S.O. 1990, c. S.22; R.S.O. 1990, c. J.1.

¹⁶ John Willis, "The McRuer Report: Lawyers' Values and Civil Servants' Values" (1968), 18 *U. of Toronto L.J.* 351.

¹⁷ *Government Regulation: Issues and Alternatives 1978* (Toronto: Ontario Economic Council, 1978). The Council made what it believed to be the first public inventory of regulatory bodies in 1977: Barry Bresner, et al., "Ontario's Agencies, Boards, Commissions, Advisory Bodies and Other Public Institutions: An Inventory (1977)," *id.*

for financial support. The regulatory agencies are funded from the Consolidated Revenue Fund or by monies collected from the public by means of levies. Their budgets are included in the budgets of the related ministries and they are expected to adhere to Management Board administrative directives. In all but a few cases, the staff of Schedule I agencies are public servants. Most Schedule I agencies also receive administrative support from the ministries. The chairs of Schedule I agencies are advised to enter into Memoranda of Understanding with their responsible ministers. The Management Board Guidelines also set out criteria for the establishment of agencies.

(iv) The Standing Committee on the Legislative Assembly (1986)

In 1986, the Standing Committee on the Legislative Assembly studied order-in-council appointments.¹⁸ The Committee focused on the Legislature's role in scrutinizing government action and the implications for appointments to various agencies. The Committee recommended the publication of a special annual edition of the Ontario *Gazette* listing all agencies and appointments. Newspaper advertisements would invite people to apply for appointments, and applicants would channel their requests through their local MPPs. The Committee also recommended establishing a data bank and a separate Appointments Secretariat in the Office of the Premier. Orders-in-council would be tabled in the Legislature and referred to the appropriate standing committee, which might hold hearings to examine a nominee's qualifications. The standing committee's report would only indicate whether it agreed with the nomination; no reasons would be given. The appointment would not take effect for sixty days or, if the committee decided not to review the nomination, for thirty days.

(v) The Canadian Bar Association, Ontario Branch (1988)

The Ontario Branch of the Canadian Bar Association examined the appointment process in 1988.¹⁹ The Committee on Appointments to Administrative Tribunals recommended enactment of an Administrative Tribunals Appointments and Tenure Act. Tribunals, with Cabinet approval, would identify the skills and experience needed by members. All vacancies would be advertised and the tribunal would be consulted about appointments. Any appointment made over the objection of the tribunal Chair would be accompanied by a written explanation tabled in the Legislative Assembly. Procedures would be instituted to vet nominees and deal with reappointments.

(vi) The Ontario Law Reform Commission (1988)

The Ontario Law Reform Commission did preliminary consultations with academics and tribunal chairs in 1988 in anticipation of an Administrative Justice Project. Common themes emerged from the consultations: the quality of the decision-maker and the implications for appointments, and terms and conditions of appointment; training; accountability and independence; consolidation of resources or jurisdictions of various tribunals; the establishment of a supervisory body that might handle various responsibilities, including complaints, training,

¹⁸ *Report on Appointments in the Public Sector*, 2nd Sess., 33rd Parl., 35 Eliz. II, June 26, 1986.

¹⁹ Ontario Committee on Appointments to Administrative Tribunals, *Report*, December 12, 1988.

appointments, and ongoing review and research on administrative law matters.²⁰ The Project was not carried out since Mr. Robert Macaulay had begun his study of agencies at the request of Management Board.

(vii) The Review of Ontario's Regulatory Agencies (Macaulay Report) (1989)

The Report on the Review of Ontario's Regulatory Agencies (the Macaulay Report) provided an impetus for much of the current reform and discussion of the administrative justice system in Ontario.²¹ Management Board requested Robert Macaulay, a former Minister of Energy and former Chair of the Ontario Energy Board, to prepare an in-depth review of the regulatory agencies, boards and commissions "to support [the] objectives of ensuring efficient, effective service delivery in government."²² Mr. Macaulay consulted widely, speaking to chairs, agency members, deputy ministers, lawyers, judges, the Ombudsman, the Information and Privacy Commissioner, academics, people in other governments, and others interested in administrative justice generally.

The Macaulay Report made eighty-one recommendations. A key proposal was the establishment of a Council for Administrative Agencies that would have a number of functions. These would include: maintaining an inventory of qualified applicants; interviewing applicants; making recommendations respecting the suitability and qualifications of applicants; training agency members; and developing standards for evaluation and appraisal of performance of agency members and their suitability for reappointment. The agency Chairs would be consulted on appointments and reappointments; there would be no limit on the number of terms for which a member could be reappointed. The proposed Council would also review the terms and conditions of appointments, including the salary levels and other benefits.

The Report recommended a number of amendments to the *Statutory Powers Procedure Act*, several of which were adopted. It also recommended that the functions and performance of agencies should be evaluated at least every four years. The private sector should be involved in the reviews, and the benefits and direct and indirect costs of agency decisions should be evaluated. The Report endorsed "sunset" provisions to terminate an agency unless it was renewed by the government.

(d) OTHER EXAMINATIONS OF THE ADMINISTRATIVE JUSTICE SYSTEM

Other jurisdictions, notably Québec and the Federal Government, have examined agencies and made recommendations that have influenced discussion and reform in Ontario.

²⁰ See a series of unpublished papers were produced by consultants and staff to the OLRC: "Administrative Justice: A Discussion Paper"; "Enhancing the Quality of Performance of Provincial Administrative Agencies"; Roderick A. Macdonald, "Enhancing the Quality of Performance of Provincial Administrative Tribunals: Some Thoughts for an Agenda"; T.G. Ison, "Influencing the Performance of Administrative Adjudication"; and Kenneth P. Swan, "Administrative Justice: A Commentary."

²¹ *Directions* (Toronto: Queen's Printer for Ontario, 1989).

²² *Id.*, at 1-2. As noted above, the term "regulatory" agency refers to all the agencies that would be considered part of the administrative justice system, not merely to those whose jurisdiction is economic regulation.

(i) Studies by the Federal Government

At the Federal level, two royal commissions have examined administrative tribunals: the Glassco Commission in 1962²³ and the Lambert Commission in 1979.²⁴ The Regulation Reference of the Economic Council of Canada made recommendations on the roles and responsibilities of the economic regulatory tribunals.²⁵ The Law Reform Commission of Canada carried out a series of studies, including Working Paper 25, culminating in the *Report on Independent Administrative Agencies*.²⁶ The Special Parliamentary Committee on Regulatory Reform studied and made recommendations about the federal economic regulatory tribunals²⁷ and the Standing Joint Committee on Regulations and other Statutory Instruments issued regular reports on the use of delegated powers, including those exercised by federal government agencies and tribunals.²⁸ The Special Committee on Reform of the House of Commons (the McGrath Committee) made recommendations about the role of Parliament in examining appointments to major federal regulatory tribunals.²⁹ The Privy Council Office Review Group on Regulatory Reform of Crown Agencies examined the four major federal regulatory agencies: the National Energy Board, the Canadian Transport Commission, the Canadian Radio-television and Telecommunications Commission, and the Atomic Energy Control Board.³⁰ The Neilsen Task Force on Regulatory Programs examined the substantive activities of federal regulatory tribunals, while the Task Force on Agencies examined ways of strengthening accountability, ensuring competency, and minimizing adverse impacts on the private sector.³¹

²³ Canada, Royal Commission on Government Organization, *Report*, Vol. 5 (Ottawa: Queen's Printer, 1962) at 72-75.

²⁴ Canada, Royal Commission on Financial Management and Accountability, *Final Report* (Ottawa: Minister of Supply and Services, 1979).

²⁵ Canada, Economic Council of Canada, Regulation Reference, Interim Report, *Responsible Regulation* (Hull, Qué.: Minister of Supply and Services Canada, 1979); Canada, Economic Council of Canada, Regulation Reference, Final Report, *Reforming Regulation* (Hull, Qué.: Minister of Supply and Services, 1981).

²⁶ Law Reform Commission of Canada, Working Paper 25, *Independent Administrative Agencies* (Ottawa: Minister of Supply and Services, 1980); Law Reform Commission of Canada, Report 26, *Report on Independent Administrative Agencies: A Framework for Decision Making* (Ottawa: Minister of Supply and Services, 1985).

²⁷ Canada, House of Commons, Special Committee on Regulatory Reform, *Report* (Ottawa: Minister of Supply and Services Canada, 1981).

²⁸ For example, the *Second Report to both Houses of Parliament*, 2nd Sess., 30th Parl., 1976; the *Fourth Report to both Houses of Parliament*, 1st Sess., 32nd Parl, 1980.

²⁹ *Report of the Special Committee on Reform of the House of Commons* (Ottawa: Supply and Services Canada, 1985).

³⁰ Canada, Privy Council Office, *Final Report* (Ottawa: photocopy, 78 pp., November, 1981).

³¹ Canada, Task Force on Program Review, Study Team Report, *Regulatory Programs* (Ottawa: Minister of Supply and Services, 1986); Canada, Task Force on Program Review, Study Team Report, *Management of Government Regulatory Agencies* (Ottawa: Minister of Supply and Services, 1985).

(ii) The Canadian Bar Association Task Force (1990)

The Canadian Bar Association Task Force Report on *The Independence of Federal Administrative Tribunals* (the Ratushny Report) is the most recent addition to the literature on federal administrative justice system agencies.³² The Report focussed on questions of the independence and relationship of federal agencies to the government, including appointments, tenure, remuneration, training and the accountability of agencies and members. Although the Report specifically stated that it did not deal with the substantive mandates or procedures of the agencies and did not intend to limit the flexibility of agencies to seek effective procedures, it has been criticized as imposing a "judicial" model of decision-making on federal tribunals. The proposed method of appointment to tribunals that adjudicate on individual rights (e.g., the Canadian Human Rights Tribunal, the National Parole Board, the Competition Tribunal, the Pension Appeals Board, and the Civil Aviation Tribunal) was based on the appointment of judges to the courts and recommended appointment until retirement. Other recommendations included the enactment of a Federal Agencies and Tribunals Act, which would establish the Office of Commissioner for Federal Tribunals and Agencies to ensure the institutional independence of the agencies. The Commissioner would maintain a public list of vacancies on tribunals and screen candidates for minimum qualifications. The Commissioner would also conduct performance reviews of the tribunals for quality, efficiency and productivity. A Council of Tribunal and Agency Heads would be established that would deal with appeals on nonrenewal of appointments, write a binding Code of Conduct for appointees, mediate on disputes between chairs and members, investigate complaints from the public, handle discipline, and impose sanctions for misconduct by members.

(iii) Studies in Québec

Québec has also intensively studied the administrative justice system in the last thirty years.³³ Two recent Québec studies recommend some important changes in the structure and relationships of agencies. The Report of the Working Group on Administrative Tribunals (Ouellette Committee) was published in 1987.³⁴ It dealt with twelve nonjudicial bodies that heard appeals from other decision-makers and used quasi-judicial procedures. In comparing the recommendations of the various studies, it is useful to remember that many of the other federal and provincial studies dealt with economic regulatory tribunals or a broader range of agencies. The Ouellette Report made recommendations in four areas; the organization and consolidation of tribunals; the status of members of tribunals; procedure before tribunals and the institutionalization of tribunals. Rationalization would result in four new tribunals,

³² (Ottawa, Canadian Bar Association, September, 1990). The Report was accepted, in part, by the CBA at its 1991 Annual Meeting; recommendations 27 to 31, dealing with the role of Parliament in the appointment process, were referred to the Minister of Justice for her consideration.

³³ A quick survey of studies can be found in La Conférence des juges administratifs du Québec, *Commentaires sur le Project de Loi 105, Loi sur la justice administrative*, 1994.

³⁴ Groupe de travail sur les tribunaux administratifs, Rapport, *Les Tribunaux Administratifs: L'heure est aux décisions!* (Québec: Les Publications du Québec, 1987). See, Roderick A. Macdonald, "Reflections on the Report of the Québec Working Group on Administrative Tribunals (Ouellette Commission Report)" (1988) 1 C.J.A.L.P. 337.

supervised by a proposed Council on Administrative Tribunals. The Council would also deal with training, discipline, recruitment and evaluation of members. Bill 105 was introduced to implement many of the proposals, but died on the Order Paper in 1994.

A second, complementary study was undertaken by a Working Group headed by Prof. Patrice Garant.³⁵ Briefly, the Working Group recommended a rationalization and categorization of administrative justice agencies. One objective is to “dejudicialize” the proceedings of a number of agencies. It also considers decisions being made elsewhere in the administration, that is, within ministries, that affect people’s rights. It recommended that an appeal tribunal, le Tribunal administratif du Québec, should be established with five divisions (social affairs, employment injuries, real estate assessment, land and environment, and general division). The appeal jurisdiction of existing agencies should be assigned to the Tribunal. Other administrative justice agencies should not be considered tribunals acting “judicially,” but should only be required to act “fairly.” The Québec *Charter of Human Rights and Freedoms* should be amended so that it is clear that subsection 56(1), which requires a fair hearing before an “independent and impartial” tribunal, applies only to tribunals, as defined, and not to the other agencies.

(iv) General Themes

In one form or another, the studies allude to certain problems that plague the administrative justice system: poor quality appointments; lack of training; uncertainty of tenure or other problems with the terms and conditions of appointment; poorly defined reporting relationships; the difficulty of defining “independence” in this context; inappropriate relationships between the tribunal and the political or bureaucratic executive arm of government; confused or poorly defined accountability; and various problems with procedures or delivery of services.³⁶

There is general agreement on the need for high quality appointments of competent, suitable people. Various proposals to achieve this objective include: establishment of a data bank of qualified individuals, public notice of vacancies, consultation with the agency and chair, and a public review process. Training of agency members is given a high priority. There is also general agreement on the need for some body or council to carry out various functions. The exact role of this organization varies, but common functions include training, advising on appointments, developing conflict of interest guidelines, and coordinating shared use of resources. Some studies suggest this organization should play a role in dealing with public complaints and discipline of agency members.

Since these studies were made, however, the various players in the Ontario administrative justice system have implemented a number of the proposed recommendations or made other changes in the system. These reforms must be considered in any examination of the system in Ontario since the landscape is changing and some of the commentary on the administrative justice system has become dated.

³⁵ Rapport du Groupe de travail sur certaines questions relatives à la réforme de la justice administrative, *Une justice administrative pour le citoyen*, 7 Oct. 1994. For a commentary, see, Me Patrick Robardet, *Communication présentée au Congrès des Sociétés savantes*, Association Canadienne de science politique, Montréal, juin, 1995.

³⁶ For a summary of the various studies and their proposals, see, Margot Priest, “The Structure and Accountability of Administrative Tribunals” in Special Lectures of the Law Society of Upper Canada 1992, *Administrative Law: Principles, Practice and Pluralism* (Toronto: Carswell, 1993).

(e) THE REFORMS INITIATED BY THE ONTARIO TRIBUNALS

In recent years the Ontario administrative justice system agencies have themselves been initiating an unprecedented number of reforms. While many of the reforms proposed by the various studies noted above require government action or legislation, significant changes can be made in the internal workings of an agency by either individual agency action or cooperative efforts in the administrative justice community. Broader reform proposals may in some cases be built upon these existing actions by the community to improve administrative justice.

(i) The Society of Ontario Adjudicators and Regulators (SOAR)

In 1988 several Chairs of Ontario agencies began to meet informally. They discovered that they had many common interests in spite of their tribunals' having varying mandates, powers, budgets, and clienteles. There were common concerns about quality of appointments, training for new members, increasing caseloads, and reduced resources. Ontario tribunals and chairs had been active participants in the Council of Canadian Administrative Tribunals (CCAT) for several years and regularly attended its annual conferences. With CCAT as a model, the informal meetings evolved into a "Chairs' Circle" that met monthly. An annual conference (COBA: Conference of Ontario Boards and Agencies) and *ad hoc* training sessions were organized. In 1991, a formal organization, the Society of Ontario Adjudicators and Regulators (SOAR), was incorporated.

The SOAR objectives include the following:

- To facilitate the sharing of professional information and experience amongst its members.
- To assist in the education and training of agency members and executive staff.
- To contribute to the specific development of and to help in the resolution of particular problems in Ontario's system of administrative justice.
- To be a source of reliable and objective information and consultation for the Ontario government in respect of the administration, development and improvement of the administrative justice system.
- To develop or help develop model codes of ethics and conflict-of-interest guidelines for agencies and their members and executive staff.
- To develop or help to develop model standards of criteria in respect of service to the public; member qualifications; member recruitment processes; member selection and appointment processes; member compensation and benefits; member performance criteria and evaluation; member discipline; public complaints; and government-agency relationships.
- To develop or to help to develop model standards or criteria for agency adjudicative, regulatory and administrative processes and procedures, and for resources and performance.
- To cooperate with agency members and staff in other Provinces and in the Federal jurisdiction, and with their organizations, in pursuit of similar goals.
- To facilitate the collaboration of related agencies in contributing to developments in law and policy in their specific fields of interest.³⁷

³⁷ SOAR's Mission and Goals, reprinted in *SOAR Newsletter*, Vol. 1:1, June, 1993, at 2.

SOAR is nonpartisan and its individual members include both agency members (usually order-in-council appointees) and agency staff (usually public servants). Its constitution has recently been amended to extend membership to ministry staff assigned full time to functions comparable to agency adjudication. While a major focus of SOAR has been to establish and improve training for agency members and staff, it has also been active in a number of areas where it is believed that reforms are required to allow the administrative justice system to work effectively.

(ii) Statement of First Principles

SOAR has been a major advocate of the concept of agencies existing as part of a *system* of administrative justice. This system, in turn, is an important part of the justice system as a whole, which includes the courts, court administrators, policy makers and enforcement officials. In SOAR's view, agencies do not exist simply as disparate, unconnected *ad hoc* bodies, but rather are part of the larger system of administrative justice.³⁸ In examining broader issues relating to that system, such as service equity or accountability, it was thought useful to establish some first principles against which to judge other actions.

SOAR set up a committee to draft a statement of first principles. The committee included not only agency chairs and members who dealt with varying clientele, but also a representative from a legal aid clinic and a prominent academic. The result was a statement of principles accompanied by commentaries and was broader than a statement of principles of administrative law *per se*. It was intended to provide principles for the structure and actions of agencies, for the establishment of agencies, and for the behaviour of members and staff. It was also intended to provide a framework for SOAR's work.³⁹ The principles, with their commentary (abbreviated), are:

- *Administrative justice requires that the adjudicative process be accessible.*

The requirement of accessibility deals with physical access, linguistic access and geographic access. As a rule, people should not have to travel unreasonable distances in order to participate in the adjudicative process. The process should be culturally sensitive, and information about the process should be readily available. People should not be excluded because of lack of ability to pay, and competent, professional assistance should be available to parties who require it. Different techniques, including teleconferencing, video conferencing and paper hearings, should make the adjudicative process more convenient and available to users.

- *Administrative justice requires that the adjudicative process be understandable and transparent.*

An understandable adjudicative process is readily comprehensible to the people who use it. There is a contact person, with a name and phone number, who can describe the

³⁸ This does not derogate from the problems relating to the individual and *ad hoc* creation of specific agencies, but emphasizes that the numerous individual decisions relating to the creation and structure of agencies have resulted in a system. It may have Topsy-like dimensions that require examination and possibly reform, but it can be approached as a system.

³⁹ The Ombudsman Ontario is also working on a draft of "Administrative Fairness Standards" that sets out the standards used by the Ombudsman in evaluating governmental decisions. These include such matters as decisions that are wrong in law or oppressive, as well as such factors as courtesy, timeliness, use of plain language, and use of preferred language.

process and procedures. Persons who use the process can learn about the consequences of their actions or decisions relating to the process; for example, they can find out about costs, potential suspension of benefits and the consequences of negative findings, as well as the advantages of pursuing the administrative process. They can find out the status of the file, including when a decision is likely to be issued. Plain language is used throughout the process, with limited use of technical terms or specialized jargon. Brochures, practice notes, rules of procedure, policy statements, guidelines, published reasons, and case summaries are available. Annual reports are informative and educative. These sources of information can be found in public locations, such as libraries or government offices, and on electronic bulletin boards.

In a transparent adjudicative process, the decision-maker and the rationale for the decision can be identified. The reasons for the decision should clearly show the basis and logic of the decision. The hearings are generally open to the public.

- *Administrative justice requires that the adjudicative process be lawful, fair, expeditious, efficient and affordable.*

The adjudicative process must follow the law, including all relevant statutory provisions and common law, and must avoid delays without sacrificing fairness and a just resolution. Persons should not be barred from initiating or completing the adjudicative process due to limited financial resources. From the public perspective, the adjudicative process must be efficient and effective.

- *Administrative justice requires that the adjudicative process provide an opportunity to resolve issues without a formal hearing and be as informal and nonconfrontational as the law and subject matter permit.*

Encouraging and facilitating the informal resolution of as many issues as possible, including settlement of all issues, can often produce the best result for the parties. Even if all issues are not resolved informally, adjudication is more efficient and less costly if parties can reduce the number of issues to be adjudicated. The adjudicative body can play an active role in facilitating the settlement of issues, but must be sensitive to any imbalance of power that may exist among the parties. A settlement may require approval by adjudicators for the sake of consistency or recognition of public interest.

Although the administrative system of justice is complementary to the court system, its procedures need not be court-like. Adjudicators should control excessive adversarial techniques of lawyers or agents such as unnecessarily aggressive cross-examination.

- *Administrative justice requires that persons who are unrepresented by counsel or an agent not be unduly disadvantaged in the adjudicative process.*

Persons who act for themselves should not be prejudiced in their access to or utilization of the adjudicative process. Adjudicators should be alert to those disadvantages that may be minimized by maintaining control of the process. Clear and simple procedures and opening explanatory remarks by adjudicators at the beginning of hearings, as well as avoidance or explanation of legal or technical language, will assist in this regard.

- *Administrative justice requires that decisions in the adjudicative process be consistent.*

The consideration in the adjudicative process of like fact situations should over time lead to like results. Techniques must be found to enable adjudicators to be both consistent in their decision-making and responsive to the facts of the individual case. Adjudicators should explain departures from earlier decisions or policies. Techniques to enhance consistency can include training, dissemination of reasons for decision or consolidated

practice notes, development of policy statements, use of generic proceedings, rule-making proceedings, and development of a data base of decisions indexed by key words.

- *Administrative justice requires that all persons be treated with courtesy, dignity and respect, and with the utmost regard for the principles of equality and fundamental justice.*

Adjudicators and staff who work with the public should be sensitive to the diversity of client needs and concerns. Services should be provided in a manner that is helpful, respectful, and responsive to client needs. The selection process for both adjudicators and staff should stress those attributes and orientations. Adjudicators and staff should respect not only the letter of human rights laws, but their spirit and intent. They should nurture an environment that is free from discrimination.

- *Administrative justice requires that adjudicators and staff be competent, objective, impartial, accountable, and have no conflict of interest.*

The selection process for adjudicators and staff should be open and fair. It should foster appointments of high quality that recognize the importance of appropriate experience and expertise. There should be job descriptions, service standards, conflict of interest guidelines, a code of conduct for adjudicators, and a public complaints process.

In the case of a tribunal, there should be a memorandum of understanding outlining the responsibilities, accountabilities, and operating relationships of the tribunal, chair, minister, deputy minister, and ministry. There should be a performance management system in place that does not constrain but recognizes the importance of independent decision-making. Superior performance should be recognized and appropriately rewarded; suitable action should be taken where performance does not meet objectives or is unsatisfactory.

- *Administrative justice requires that adjudicators be independent in their decision-making, and the adjudicators and staff be free from improper influence and interference.*

Independence is the ability to make decisions free from external pressure and without fear of personal consequences, including reprisals. Decisions must be based on facts, evidence, expertise, and properly delegated discretion. Independence allows for sufficient freedom to structure the process, consistent with the legislation, fairness and natural justice, and to deal with the matter before the adjudicator. Adequate funding as well as the control and management over resources are integral to the independence of the decision-making process. Independence is not the opposite of accountability, but instead should be recognized as a necessary feature and precondition for accountability.

Acceptance of the value and integrity of the administrative justice system depends upon the existence of public confidence. The adjudicator is the intermediary between the state (which recognizes, allocates and enforces rights, duties and benefits) and the individual. The respect that is accorded to this exercise of the power of the state is based to a large degree on adherence to accepted values, including fairness and freedom from improper influence.

- *Administrative justice is advanced by adjudicators and staff identifying problems and solutions respecting the governing legislation, process or structure.*

Adjudicators and staff are uniquely placed to observe the potential for improvements in legislation and its implementation. They should be encouraged to share their observations and recommendations.⁴⁰

SOAR is consulting on the draft statement of principles and seeking a consensus from the legal community and user groups, as well as from the agencies themselves and from government.

(iii) Training for Agency Members and Staff

Training of tribunal members and staff has been considered second only to the quality of initial appointments as a key factor in improving the quality of the administrative justice system.⁴¹ The Government of Ontario, however, has only recently become involved in sponsoring even the most minimal training for newly appointed members. There are no budgets specifically allocated for the training of either new or existing members. There have been no provisions for professional enrichment, continuing education, or specialized training. Tribunals in the past trained new members through on-the-job training, internal training sessions, and occasional use of other educational programs, such as the Law Society Continuing Education, Canadian Bar Association, the CCAT Annual Conference, the Canadian Institute for the Administration of Justice, the National Association of Regulatory Utility Commissioners training program at Michigan State University, the Canadian Association of Members of Public Utility Tribunals education conferences, and the training sponsored by the Association of Workers' Compensation Boards of Canada. In fact, many chairs and members of Ontario tribunals contributed time to these organizations to speak or present courses.

These Ontario tribunal members began offering occasional courses in such areas as decision-writing and the conduct of a hearing. The annual conference (COBA: Conference of Ontario Boards and Agencies) began primarily for the purpose of training members. When SOAR was established, it provided a focus for the individual tribunal members who were organizing occasional courses. A task force on training established by SOAR issued a report in November, 1993. The report confirmed that there was a pressing need for training in a number of common areas, although individual agencies will continue to require additional training tailored to the needs and mandates of their members. It recommended that training be centrally coordinated and a position of education coordinator be created. The education coordinator would work under the direction of a SOAR Education Advisory Committee.

An Education Advisory Committee was established; its members included representatives from the Management Board Secretariat and the Premier's Appointments Secretariat. After a five-month pilot project funded by the agencies and with office space provided by Management Board, the education coordinator organized a week-long program for new appointees. The program included lectures and materials on the conduct of hearings, rules of evidence, weighing of evidence, the *Statutory Power Procedures Act*, decision writing, and a simulated hearing. A "train the trainer" program was established to give intensive training to selected agency members who would be responsible, in turn, for training people at their own agencies.

⁴⁰ SOAR, Principles of Administrative Justice in Ontario's Adjudicative System, approved by SOAR Board of Governors, April, 1995.

⁴¹ Priest, above, note 36.

In order to provide funding and some stability for the education program, the agencies agreed to set up an Agency Training and Education Cooperative (ATEC). A memorandum of agreement was entered into by Management Board, the Ministry of the Attorney General and SOAR.⁴² Experience had indicated that it was important to keep the selection, design and presentation of the training programs under the direction of the agencies. The agencies would contribute toward the expenses of the secondment of an Education Coordinator; the Ministry of the Attorney General would provide office space and support for the Coordinator. The longer term objective is to fund the training program from revenues raised through program fees. This does imply, of course, that agencies have sufficient resources to train their members and staff.

The training currently being offered by ATEC includes the orientation program for new members, ethics, dealing with expert evidence, alternative dispute resolution, "train the trainer," sessions on the implementation of the new amendments to the *Statutory Power Procedures Act*, and training in performance appraisal for chairs. A special session for agency staff and management is being organized to provide training on information technology, administrative law, developing organizational skills, and dealing with difficult clients and situations.

(iii) Service Equity Plans

A Service Equity Committee, chaired by Mary Cornish, was set up by SOAR to develop a framework within which agencies could better ensure access to the administrative justice system for people who are disadvantaged for a variety of reasons. As SOAR noted in its Terms of Reference to the Committee:

Over the past two decades, our notions of discrimination have evolved to embrace the unintended as well as the deliberate, the subtle as well as the overt, policy as well as action, and "systems" as well as "behaviours." In this context, active efforts must increasingly be made to identify and eliminate discriminatory practices and systemic barriers which for many years have passed as "neutral" or "necessary" to an organization's function.⁴³

The Report noted that agencies must provide administrative justice services to a new set of consumers since the population of Ontario has changed dramatically over the past ten years. It noted that administrative justice agencies, like other government bodies, have a legal obligation under the Ontario *Human Rights Code* and the *Canadian Charter of Rights and Freedoms* to perform their duties and provide their services without barriers or discrimination. It noted that an agency that is discriminatory in its decision-making would likely breach its common law duty of fairness. It would also likely undermine public confidence in procedures and decision-making, thus undercutting the authority of the administrative justice system.

The Report recommends a change in agency focus and a recognition that the administrative justice system provides a service—decision-making—that is consumed by the public. The Service Equity Committee had consulted with a number of groups after sending out invitations to "organizations active in issues affecting First Nations and aboriginal people, racial

⁴² Memorandum of Agreement, Agency Training and Education Cooperative, 1994, p. 2.

⁴³ SOAR, Service Equity Committee Report, *Towards Service Equity in the Administrative Justice System*, October 31, 1994, p. 3.

minorities, refugee and recent immigrant groups, women, persons with disabilities, gay men and lesbians, literacy groups, persons in conflict with the law, persons living in poverty, youth, seniors, professional and labour organizations.”⁴⁴ The consultations identified a number of issues that the Report believed deserved further discussion within the administrative justice system.

- The agencies were not seen as providing a service, but rather were viewed as authoritative bodies with power to affect people’s lives.
- The existence of many agencies was not known to those whom they were intended to serve.
- The administrative justice system is generally perceived by members of disadvantaged communities as an extension of the government bureaucracy.
- Agencies are generally open to criticism that their various processes are complex and legalistic.
- Despite some degree of progress with employment equity initiatives, the administrative justice system in Ontario continues to be perceived as predominantly directed and staffed by a homogeneous population of white, able-bodied men.
- Within the agency community, there are deficiencies in the awareness of the issues affecting disadvantaged communities and a generalized lack of sensitivity toward members of these groups.
- The specialization of agencies, boards, and commissions and their jurisdictional limitations are perceived as generally arbitrary and unreasonable.
- There is a widespread perception of a general lack of commitment to equity in service delivery within the administrative justice system.

The Report recommended the development of a “service equity plan,” which would be analogous to an employment equity plan. Both types of plans require a review of an agency’s systems, the removal of barriers, and the carrying out of initiatives. The Report set out a framework for developing “service equity plans” and a “service equity checklist.” The plans would require identifying the consumers of the agency’s services and whether they have special needs; it would require the identification of any barriers to disadvantaged consumers’ receiving equal access to the level and quality of service available to other consumers. It would then identify steps to remove those barriers; these might include flexible hours of service, hearings in accessible locations, access to informal processes such as ADR, child care, and regional decision-making. The plan should include endorsement by the agency head and senior management; information sharing among staff; and appropriate training and education. The plans should be developed with the assistance of affected groups and provide for a review of service policies and practices in order to identify and remove systemic service barriers.

SOAR’s response to the Report was to establish a standing committee to coordinate and administer service equity strategies and to assess the overall performance of Ontario’s administrative justice system on service equity issues. The Service Equity Committee will work jointly with ATEC to deliver service equity training programs.

The Report and the SOAR response complement work done by individual agencies. The Environmental Assessment Board, for example, had commissioned a report, “Effective Public

⁴⁴ Id., p. 11.

Participation in the Ontario Environmental Assessment Board's Hearing Process: Barriers and Recommendations for Improvement."⁴⁵

(v) Performance Appraisals

In December, 1993, the SOAR Circle of Chairs set up a committee to develop performance standards for administrative tribunal members and to create a performance management system. The committee reviewed reports on the efficiency and effectiveness of administrative tribunals, Canadian and American legislation and literature on the management of performance of judges, and existing performance management systems used by the Ontario Public Service and some federal and Ontario tribunals.

The committee's final Report recommended that a complete performance management system be established.⁴⁶ The basic elements of such a system would include a job description for agency members; initial training and ongoing education; a set of performance standards and mutually agreed upon objectives; and an annual evaluation or review as to whether the objectives and standards were achieved.

The committee noted that, in addition to these basic elements and other tools such as mission statements, codes of ethics and administrative policies, the system should also include:

- a selection process designed to attract, identify, and choose people who have the knowledge, skills, attitudes and values needed to be a good adjudicator, including an aptitude and/or knowledge of the subject matter under the tribunal's mandate;
- a system of handling complaints about members' conduct and imposing discipline which is useful in identifying areas where the member needs assistance and support in improving his/her performance and facilitates providing such assistance and support;
- recognition of good performance.⁴⁷

Evaluations would deal with such matters as hearing preparation (e.g., dealing with organizational matters, recognizing potential conflicts of interest), conduct of the hearing (e.g., understanding of issues, open-mindedness, treating parties even handedly), decision writing (e.g., working cooperatively with other panel members, ability to write timely, clear, well-reasoned decisions), professional development, participation in tribunal business, working with tribunal staff. Evaluations would not deal with the merits of decisions made by the member.

The committee suggested that the evaluation be done by the agency chair and recommended that chairs be given training and explicit authority to carry out evaluations. It noted that there is a great deal of uncertainty about the authority of chairs to manage the performance of members (or staff). It recommended legislation to clarify this authority and suggested that it should be standard government practice to discuss and agree upon these responsibilities with prospective chairs prior to appointment.

The committee did not deal with the evaluation of the performance of chairs since this raises questions of agency accountability, independence, and relationships to government that were beyond the committee's mandate.⁴⁸

⁴⁵ Environmental Assessment Board, *Annual Report*, Fiscal Year ended March 31, 1994.

⁴⁶ SOAR, Performance Management Committee Report, *Towards Maintaining and Improving the Quality of Adjudication in Ontario's Administrative Justice Tribunals*, June, 1995.

⁴⁷ *Id.*, p. 6.

The Report included a generic job description, generic selection criteria for members, generic interview questions, and a model form for performance planning and evaluation for adjudicators.

(vi) Model Guidelines of Professional Responsibility

A committee has been organized by SOAR to develop a draft set of Guidelines. The draft will be circulated within the organization and then more broadly before adoption. The draft will be completed for debate at the SOAR annual Conference in November, 1995. The draft will cover such matters as conflict of interest (pecuniary and nonpecuniary), procedural protocols for handling conflict of interest issues, and the collegial responsibilities of members to each other, to the chair, to fellow panel members, and to the tribunal itself. It will also deal with post-term responsibilities of chairs and members.

(vii) Reforms to the *Statutory Powers Procedure Act*

SOAR played a prominent role in the development of amendments to the *Statutory Powers Procedure Act*. The original Act had been passed in 1971 to implement recommendations of the McRuer Commission (the Royal Commission Inquiry into Civil Rights). The McRuer Report set out minimum procedural rules and powers that, in the Commission's view, should apply to all tribunals. These included notice of hearing, notice of case to be met, reasonable adjournments, subpoena powers, public hearings, enforcement of orders by application to the High Court, power to administer oaths, right to counsel, counsel for witnesses, right to cross-examination, admissible evidence, official notice, written decisions, provision of reasons, compilation of record, a right of appeal, and privilege in defamation.⁴⁹ The McRuer approach to the exercise of governmental powers was aimed at providing procedural safeguards and ensuring fairness, but it has been criticized for imposing judicial values on an evolving system of administrative justice.⁵⁰

While the effect of the *SPPA* on the judicialization of agency procedures is a matter of some debate, few disagreed that the Act had become outdated in the past twenty-five years. It did not adequately reflect the reality of agency practice; for example, the hearing procedures dealt with in the Act clearly applied to oral hearings. In practice, a number of proceedings are paper or file hearings where documentary evidence is filed and tested by interrogatories or where documentary evidence is the major basis for a decision following an oral hearing.

The first serious reform proposals were made by Robert Macaulay in his Report, *Directions*.⁵¹ A Working Group in the Ministry of the Attorney General reviewed the recommendations relating to the *SPPA* and compiled a number of options for consultation. The options paper was circulated in May, 1992, and the Ministry of the Attorney General then asked SOAR to develop reform proposals. The original intention was a complete reform of the *SPPA* that would be introduced as an indication of a commitment to good government and

⁴⁸ See, below, "Administrative Justice System Council," for a discussion of appraisal of chairs.

⁴⁹ Above, note 14, Chapt. 14.

⁵⁰ John Willis, above, note 16. A full description of the original Act can be found in D.W. Mundell, Q. C., *Manual of Practice on Administrative Law and Procedure in Ontario* (1971).

⁵¹ Above, note 21.

efficient administrative justice. A SOAR working committee submitted a comprehensive *Proposal for Amendment of the SPPA* to the Ministry in December, 1993.⁵²

A limited number of the proposed amendments were included in the omnibus housekeeping bill, the *Statute Law Amendment (Government Management and Services) Act*, (Bill 175), and were proclaimed in force April 1, 1995.⁵³ The amended *SPPA* encourages agencies to develop procedural rules, which should provide greater certainty and transparency for agency actions. A SOAR working group has developed model rules relating to the exercise of selected powers pursuant to the *SPPA*. These include procedures for electronic hearings, written hearings, prehearing conferences, disclosure, and review of a decision. The model rules were distributed when the amendments were proclaimed.

(f) GOVERNMENT CHANGES IN THE APPOINTMENT PROCESS

The Peterson administration and the Rae administration each made changes to the appointment process in Ontario that built upon some of the proposals noted above. A separate Appointments Secretariat was established in the Premier's office; during the Rae administration, this was serviced largely by staff in the Management Board Secretariat. A book, *The Guide to Agencies, Boards and Commissions*, was published and placed in libraries and government offices throughout the province. It lists, with reasonable accuracy, the various agencies, including those that are part of the administrative justice system. A brief description of the agency, some information about the appointments, and the terms of the current holders of order-in-council appointments are given. In some cases, particularly with high profile adjudicative agencies, the government advertised publicly for candidates. Some agencies, including the Social Assistance Review Board and the Workers' Compensation Appeals Tribunal, had an established public process of advertising, interviews by the Chair, and referrals of suitable candidates to the minister or the Public Appointments Secretariat for consideration.⁵⁴

A major change in the appointments process introduced by the Rae Government was the referral of nominations for appointment to the Standing Committee on Government Agencies of the Legislative Assembly. The Committee selects those nominees whom it wishes to review; the Committee may call the nominee as a witness, but calls no other witnesses. The Committee report states whether or not the Committee concurs in the appointment and may state its reasons for its views.⁵⁵

⁵² For a complete description of SOAR's role in the development of the *SPPA* amendments, see Andromache Karakatsanis, "The Statutory Power Act: Empowering Tribunals—A SOAR Proposal," in P. Anisman and R.F. Reid, eds., *Administrative Law: Issues and Practice* (Toronto: Carswell, 1995) at 109.

⁵³ See, Margot Priest, "Amendments to the *Statutory Powers Procedure Act* (Ontario): Analysis and Comments," in P. Anisman and R.F. Reid, id. at 85. The *SPPA* amendments were proclaimed April 1, 1995; other portions of the Bill were proclaimed earlier.

⁵⁴ Generally, it is the responsible Minister who will determine whether such a process may be followed; the administrative justice community usually welcomes public advertisements and interviews for these positions.

⁵⁵ Standing Committee on Government Agencies, *Terms of Reference for the Review of Appointments for the Public Sector*, June 28, 1991; Premier Bob Rae, *Statement to the Legislature on Public Appointments*, December 10, 1990.

At this time, the government of Premier Harris has made no statements on the structure of the appointments process or whether the Committee review procedure will continue.

(g) MANAGEMENT BOARD AGENCY REFORM PROGRAM

(i) The Objectives of the Reform Program

In May, 1993, the Ontario Cabinet authorized a project to improve the effectiveness and efficiency of service to the public of Ontario's quasi-judicial agencies. The two specific objectives were (1) to maintain or improve the capacity for responsiveness and timely service; and (2) to contain, reduce or recover the cost of service. The Agency Reform Program was initiated in an atmosphere of deficit reduction and government restructuring to reduce costs. It grew out of a Management Board Program Review that produced five task force reports: Procedural Reform; The Quality and Efficiency of Adjudication; New Regulatory/Adjudicative Models; Restructuring of Administrative Services; and Cost Recovery and Fees Policy.

The Program Review concluded that there were problems of overlap, duplication, inefficient utilization of resources, and foregone revenue opportunities. The opportunities for restructuring occur along a continuum, ranging from amalgamation to consolidation, co-location, and innovative management. The Review indicated that the agency community itself is asking for change and is willing to do things differently. It concluded that reform should be implemented on a "family of interest" basis, which would look to commonalities of interest either in law or in the clientele served. An example of a family of interest is the equity tribunals (Human Rights, Pay Equity, Employment Equity).

In a related project initiated at about the same time, the Ministry of the Attorney General, Civil Law Division, established a Tribunals Task Force to examine whether agencies had ready access to quality legal services and what role the Civil Division should play in supplying those services. The Task Force recommended that a separate group of lawyers be created to provide legal services to the quasi-judicial agencies. The central group would provide service to agencies that currently have no or insufficient legal services. It would provide backup service and advice to those agencies that have legal staff and litigate judicial review applications for agencies. The objective would be to create a "centre of excellence" for administrative law.⁵⁶ The Report's recommendations are being considered by the Ministry of the Attorney General.

The Agency Reform Project is led by a deputy-level steering committee (including the Deputy Attorney-General, the Deputy of Management Board, two Chairs, and the Director of Public Appointments) and an ADM/Agency Chair coordinating committee.

(ii) The Co-location and Rationalization Initiatives

As a first step, the Agency Reform Project worked with SOAR to develop a data base of hearing rooms across the province. Many agencies had been informally sharing facilities, but the data base provided a comprehensive listing of the location, capacity and contact person for the hearing rooms. Arrangements were made for the central sourcing of interpreters through the Ministry of the Attorney General and an information technology survey was conducted.

⁵⁶ Tribunal Task Force, *A Report on the Delivery of Legal Services to Agencies, Boards, and Commissions for the Province of Ontario by the Ministry of the Attorney General* (March, 1993) at Appendix A, p. 1.

The Project worked with the equity rights tribunals—Pay Equity, Employment Equity and the Board of Inquiry established under the Ontario *Human Rights Code*—to consolidate their administrations. The Ontario Human Rights Commission and the Employment Equity Commission were physically located together and share resources. Some members were selected and cross-appointed to all three tribunals to permit flexibility in meeting caseloads and to use efficiently the resource of member time.⁵⁷ The Assessment Review Board (ARB) is planning to co-locate with the Ontario Municipal Board, which hears appeals from the ARB's decisions. The co-location will permit the sharing of resources and the reorganization of the ARB.

The Project is examining the feasibility of the administrative consolidation of other agencies, including the Liquor Licence Board, the Racing Commission, and the Gaming Commission. These three agencies report through the Minister of Consumer and Commercial Relations. There have also been proposals to merge these agencies into one "Sin Commission."

Other "families" of agencies are being examined for feasibility of administrative consolidation or actual merger. These include labour agencies, and agencies concerned with the use of land (Ontario Municipal Board, Environmental Assessment Board and the Environmental Appeal Board). The two environmental boards are also candidates for either administrative consolidation or merger.

(iii) Alternative Dispute Resolution

A number of administrative agencies have been experimenting with the use of alternative dispute resolution. The Ontario Energy Board, for example, has used formal settlement processes to reduce the length and complexity of major hearings. Parties meet prior to the scheduled hearing to clarify and focus issues and, if possible, reach a consensus on some matters. Because the Board must make its decision on the evidence, the parties must still provide a rationale and evidentiary base for their agreement to the Board, which can require additional information if necessary.

The Ontario Municipal Board uses a form of mediation to settle disputes prior to the hearing.⁵⁸ The Board uses both members and retired regional planning directors to mediate.⁵⁹ The mediator, who is an expert in the area, actively offers a solution to the parties. The parties may accept or refuse the solution; even a partial acceptance of the solution can shorten and simplify subsequent hearings. Board members may also direct parties to discuss settlements if a review of a file at the beginning of a hearing indicates that only a few issues are at stake; the sitting member does not participate in these meetings. The *SPPA* amendments will encourage the Board to supply a staff person or a member to facilitate settlement at these meetings.

⁵⁷ The Ontario Human Rights Code Review Task Force, *Achieving Equality: A Report on Human Rights Reform* (Cornish Report) (June 26, 1992), had suggested the establishment of a single tribunal, with expanded regional access, dealing with equity issues.

⁵⁸ Ontario Municipal Board, "Alternate Dispute Resolution at the Ontario Municipal Board"; Practice Direction No. 9, "Board Mediation."

⁵⁹ A Municipal Mediation Pilot Project based in the Provincial Facilitator's Office deals with similar matters. The OMB coordinates to ensure the mediation efforts are not duplicated.

The Ontario Liquor Licence Board mediates in selected cases of neighbourhood objections to the granting of a liquor licence. Generally if fewer than five complaints have been received and the nature of the complaints is sufficiently concrete that compromises are possible, the Board will mediate. Agreements are reached in approximately half the chosen cases. If no agreement is reached, the matter will go to a public hearing.

The Environmental Assessment Board found that prehearing conferences, which were intended to "scope" the issues, were successful in settling matters or significantly reducing the length of hearings. It commissioned a study, "The Use of Alternative Dispute Resolution (ADR) in Environmental Assessment Processes with Recommendations for Applying ADR to Environmental Assessment Board Practice."⁶⁰ As a result, it has set up a process for dealing with settlements or agreements reached by the parties that recognizes that the Board must consider matters beyond the interests of the parties in the proceeding as a regulator with a broader public interest mandate. The Board has established a Protocol for Consideration of Agreements among Parties. The Protocol states: "When the Board is satisfied that an agreement represents the combined interests of: the proponent, those affected (e.g., citizens groups, individuals), the regulatory authorities, other affected governments (e.g., municipalities) and that the project is consistent with the purpose and provisions of the relevant legislation and is in the public interest, it will accept and formally adopt the agreement." The Board uses the provisions of section 4 of the *SPPA* to do this. The Board, in its Mission Statement, is committed to using creative mechanisms and less formal processes at any point in the environmental assessment process where the Board is involved.

The staff of the Ontario Securities Commission has the first-level responsibility for approving prospectuses, registrations and exemptions from the application of the *Securities Act*. The Commission may hear appeals from the decisions of staff. The Commission now has a procedure that allows an applicant to meet with a Commissioner to attempt to resolve differences of opinion or interpretation without a hearing or to narrow the issues in dispute prior to a decision being issued by the Executive Director.⁶¹ Affected parties are notified and may participate in the meeting. If the meeting does not resolve the matter successfully and the Executive Director issues a decision that the applicant wants to appeal to the Commission, the Commissioner who met with the applicant will not sit on the panel to decide the matter. The fact of the meeting and the substance of the meeting may not be raised at the subsequent Commission hearing.

Other tribunals have also been able to narrow issues or encourage parties to reach agreements in prehearing conferences, although they have not had a formal mediation process.⁶² The new amendments to the *Statutory Powers Procedure Act* specifically provide authority to tribunals to mediate and, if a tribunal member presides at the mediation, to issue what orders are advisable. These orders might be procedural to allow a hearing to run more

⁶⁰ Environmental Assessment Board, *Annual Report*, Fiscal Year ended March 31, 1993.

⁶¹ (1994) 17 O.S.C.B. 3629, 3631.

⁶² The factual report on agencies prepared by Larry Fox, Policy Branch, Policy Planning and Constitutional Law Division, Ministry of the Attorney General, notes the use of ADR in responses to his survey. For example, ADR is used by the Child and Family Services Review Board to identify and narrow issues in dispute; the Environmental Appeal Board uses prehearing conferences and settlement conferences to narrow or settle matters.

smoothly, or they might be substantive and similar to the order that would have been imposed by the tribunal after an ordinary hearing.

A number of tribunals are therefore interested in exploring the potential of ADR for either the resolution of the matter before them or the simplification and clarification of the issues in order to use the hearing time more effectively. Some tribunals are authorized or required to use mediation as a regular part of their process and the agency community includes a number of skilled mediators.

The Management Board Agency Reform Project has begun a "Dispute Systems Design Consultancy" to create a more formal and organized means of drawing on the existing ADR experience and skills. Mediation skills are found in such agencies as the Ontario Labour Relations Board, the Ontario Insurance Commission, the Education Relations Commission and the Office of Social Contract Adjudication. There are also experienced mediators in the Ministry of the Attorney General and the Ministry of Labour.

The Consultancy acts as a broker to put experienced ADR professionals together with the "client" agencies that are interested in learning more about ADR. The participating ADR agencies and their professionals will provide analytic, design and evaluation services to the agencies that are interesting in establishing or improving their ADR capacity. The Consultancy is a test project, but the objective is to institutionalize alternative approaches to delivering government services, in this case, adjudicative services. Evaluation criteria have been built into the project.

As a complementary project, ATEC is providing ADR training to tribunal members. In some cases, the ATEC project is using knowledgeable people identified by the Consultancy.

(iv) Integrated Case Management Systems

Approximately seventy-six administrative agencies and several ministries such as the Attorney General, the Solicitor General and Correctional Services are responsible for managing "cases." A number of agencies, including the Social Assistance Review Board, the Insurance Commission, and the Workers' Compensation Appeals Tribunal, have developed automated case management systems on their own. Some agencies have relatively small caseloads and do not require elaborate or technology-driven systems. Many other agencies, however, either do not have the automated capability or need to upgrade their existing technology in order to effectively manage cases from initial application to final disposition. The increasing agency caseloads and the limitations of *ad hoc* solutions indicate that a priority should be placed on improved case management.

The types of cases and adjudicative processes differ among agencies. Nonetheless, there is a group of core business processes that are common across the agency sector. A preliminary assessment by the Agency Reform Project indicated that for a disparate group of agencies, there were about fifteen steps to a case management system; twelve of those steps were common to the various agencies. For example, agencies with disparate mandates all receive applications, set up files, assign investigators or adjudicators, schedule hearings, set deadlines for filing of information or the completion of other steps, and issue decisions. To continue to individually develop systems is not cost effective when a common case management system could be designed that could be customized at minimal additional cost.

The Agency Reform Project, in cooperation with the Ministry of the Solicitor General and Correctional Services, proposes to work with a private sector partner to develop generic information technology architecture that can be applied to case management within both the

parole system and other administrative agencies. Agencies that will work on the development of the system include the Human Rights Commission, the Employment Equity Commission, the Pay Equity Commission, the Ontario Energy Board, the Commercial Registration Appeals Tribunal, the Board of Parole, and the Health Services Appeal Board.

The generic case management system would contain the following functions:

- tracking people and organizations (parties, counsel, expert witnesses, etc.);
- management of case-related information (applications, documentary evidence, exhibits, interrogatories, staff analyses, medical reports, etc.);
- planning and scheduling activities and events (prehearing conferences, hearings, deadlines for filing evidence or argument, etc.);
- workflow management;
- document management;
- access to program and policy information;
- access to related ministry information systems;
- monitoring, status and statistical reporting;
- expenditure and revenue tracking.

Having such a system is not only critical to the effective management of increasing caseloads, but is also necessary in an environment of fiscal restraint and cutbacks. Better information about expenses and the comparative costs and results of different approaches to case management will be necessary to use resources more effectively. A request for a proposal from the private sector to develop software has been issued.

(v) **Model Memorandum of Understanding**

Directives and Guidelines established by Management Board suggest that ministers and the chairs of “regulatory” agencies sign a memorandum of understanding that sets out their respective responsibilities.⁶³ The memoranda are to be approved by Management Board. In practice, only about a dozen agencies had or have memoranda. The contents and relationships established in the documents were inconsistent and based on the priorities and philosophies of the individuals negotiating them. New memoranda are supposed to be negotiated whenever the minister or agency head changes, but old memoranda remain in force until new ones are signed.

A coordinating committee of the Agency Review Project drafted in 1994 a model MOU that could be used by chairs and ministers in negotiating their memoranda. It included such matters as a commitment by the minister to consult with the chair on appointments and reappointments. It has no official status and has not yet received any approval by Management Board as a model.

⁶³ Such memoranda are required for operational agencies (e.g., Schedule II, Schedule IV agencies) and Schedule I advisory and regulatory agencies that do not adhere to the criteria of the schedule or that provide their own support services.

2. PROFILES OF SIX SELECTED ONTARIO AGENCIES⁶⁴

The Fundamental Issues Group is concerned, among other matters, with alternatives to the courts. This paper seeks to examine a selected number of agencies that deal with disputes that might, in the absence of these agencies, be dealt with by the courts. The six agencies studied represent only a small portion of the agencies in the administrative justice system and the emphasis is on agencies that adjudicate in matters of individual entitlements or obligations. The economic regulatory agencies and the licensing agencies were not chosen by the Fundamental Issues Group for study because historically the courts have played a lesser role in these areas and the agency process is not as clearly an alternative to court action. The lessons to be learned from the selected agencies, however, are broadly applicable in light of the extensive commonalities among agencies and need for structural reform.

The Social Assistance Review Board (SARB) is an example of a "mass adjudicator" that removes appeals from the courts in order to provide a speedier, less formal and less costly process for citizens seeking to challenge bureaucratic decisions. The Workers' Compensation system, the Criminal Injuries Compensation Board, and the Insurance Commission represent various forms of substitutes for civil tort litigation in the courts. The processes and criteria for decision of these agencies are different from those of the courts; for example, the emphasis on allocation of fault is reduced or eliminated. The injured party also does not need to rely on the solvency of the "tortfeasor" under these compensation systems. For compensation, an injured worker or crime victim looks to a government fund and an auto accident victim looks to insurance or to a fund if injured by an uninsured driver.

The Employment Standards Administration, in contrast, is primarily concerned about the enforcement of a regulatory system of occupational health and safety and minimum conditions of employment. The system allows for the parties, essentially workers and employers, to seek clarification and adjustments in orders made by Ministry enforcement officials. The courts are saved for enforcement of more serious violations pursuant to the procedures of the *Provincial Offences Act*.

The Ontario Human Rights Commission and Board of Inquiry deal with individual and systemic discrimination. The human rights system is an alternative to recourse to the courts for enforcement of individual statutory civil rights.⁶⁵ Its establishment reflects the social and political policies that recognize the difficulties of individual civil suits and the limitations on court actions dealing with systemic discrimination. It also reflects the additional roles that administrative justice system agencies can play in education and in consciously establishing social policy through advocacy and decision-making in key cases.

Several of the administrative justice system agencies examined here have been studied extensively in the past. This paper does not purport to provide an in-depth examination of the agencies, but rather aims at providing an overview of selected agencies and identifying some outstanding issues or problems that can point the way to areas in which reforms to the administrative justice system may be required.

⁶⁴ In describing these agencies, I am indebted to, and have drawn heavily on, the work done for this Project by Larry Fox, Policy Branch, Ministry of the Attorney General.

⁶⁵ Walter Surma Tarnopolsky, *The Canadian Bill of Rights*, 2d ed. (Toronto: McClelland and Stewart Limited, 1975), Chaps. II and VIII.

(a) THE SOCIAL ASSISTANCE REVIEW BOARD

The Social Assistance Review Board (SARB) hears appeals under three statutes: The *General Welfare Assistance Act*,⁶⁶ the *Family Benefits Act*,⁶⁷ and the *Vocational Rehabilitation Services Act*.⁶⁸ SARB's mandate is to provide an independent review of administrative decisions relating to social assistance made by municipal and provincial bureaucrats. General welfare assistance is intended to provide short-term financial support and is administered by municipalities and First Nations. Local administrators or band welfare administrators make the decisions about eligibility and the amount of benefits.

The family benefits program is administered by the province and is intended to meet long-term financial needs. Typical users of the program are single parents and persons with disabilities. The vocational rehabilitation services program is designed to help persons with disabilities become employable. It is a provincial program offering job counseling, assessment, placement and other assistance. Interim financial assistance may also be granted to cover appellants' needs while their cases are pending before the Board.

An individual may appeal to SARB any decision made by municipal, band, or provincial welfare administrators to refuse, reduce, suspend or cancel benefits under any of these programs. The *Statutory Powers Procedure Act* applies to appeals, but not to applications for interim assistance. SARB is unusual in having a provision in its enabling statute requiring it to hold its hearings *in camera*.⁶⁹ The SARB decisions may be appealed to Divisional Court on a question that is not a question of fact alone. The actions and decisions of SARB may also be subject to judicial review pursuant to the *Judicial Review Procedure Act*.⁷⁰ SARB has the jurisdiction to hear a challenge based on the *Canadian Charter of Rights and Freedoms*.⁷¹ SARB can also reconsider a previous decision and require a new hearing. This is normally done when new evidence is available or there has been an obvious error in fact or law made.

The workload of SARB has increased dramatically in recent years and is influenced by general economic trends and the initial decisions being made at the municipal and provincial administrative level regarding eligibility or level of benefits. The 1993-94 *Annual Report* notes that in that year the SARB caseload increased faster than the social assistance caseload in the province. The SARB caseload increased forty-five percent while the number of people receiving benefits increased only 7.4 percent. The Board attributed the increase to several factors, including changes in regulations, fraud reduction efforts, an enhanced verification program that requires more extensive documentation of eligibility, and efforts to collect

⁶⁶ R.S.O. 1990, c. G.6.

⁶⁷ R.S.O. 1990, c. F.2.

⁶⁸ R.S.O. 1990, c. V.5.

⁶⁹ *Ministry of Community and Social Services Act*, R.S.O. 1990 c. M. 20.

⁷⁰ R.S.O. 1990, c. J.1.

⁷¹ Being Schedule B to the *Canada Act*, 1982 (U.K.), 1982, c. 11; *Director of Income Maintenance Branch, Ministry of Community and Social Services v. Sophia Mohammed and the Administrator for Social Services for Metropolitan Toronto*, Divisional Court, unreported, Oct. 28, 1992.

overpayments.⁷² There was also a dramatic increase in requests for interim assistance while the appeals were pending.

SARB used several methods to deal with the increased caseload. Single-member panels hear most cases; longer notice of hearing dates is given so that parties have sufficient time for preparation and fewer adjournments are granted. Simple cases are overbooked so that little time is lost when applicants fail to appear, while more time is scheduled for complicated hearings. A computerized program was developed to deal with the new scheduling practices. An inactive list was introduced so that hearings are not scheduled until the case is ready to proceed. Written reasons are only provided on request for routine cases where the parties understand the rationale of the decision; written reasons are therefore provided for approximately half the decisions. A short form decision format may also be used for routine and comprehensible cases.

SARB has very good data available on its caseload and disposition of cases by result and type of application. In 1993-94, for example, it held 5,536 hearings and issued 5,190 decisions. The Board granted forty-five percent of the appeals in which the applicant appeared, and granted fifty-one percent of the interim assistance requests. There were a significant number of appeals, however, in which the applicant failed to appear. Nearly one-third of applicants for general welfare and seventeen percent of the applicants for family benefits did not appear at their hearings; in these cases, the appeals were almost always denied since no evidence was presented for the applicant.

The length of time to dispose of a case averaged 154 working days in 1993-94. In the 1994-95 fiscal year, however, this increased to 205 working days. The average time from the hearing to the release of the Board's decision was thirty-seven working days in 1993-94, and this increased to forty-six working days in 1994-95. The hearings themselves are relatively short; they range from forty minutes to three days in length, with the average hearing lasting about ninety minutes.

Applicants may speak for themselves at a hearing or may be represented by counsel or an agent in accordance with section 10 of the *SPPA*. SARB keeps statistics on the outcome of appeals according to the type of representation. According to the 1993-94 *Annual Report*, approximately thirty-four percent of the appeals are granted where the appellant appears alone. If the appellant is represented by counsel, over sixty-seven percent of the appeals are granted.⁷³ The appellant is successful fifty-one percent of the time if represented by a family member, friend or other agent. Where the appellant appears alone, the Board is also more likely to find that the appeal is out of time or there is no jurisdiction for the appeal or that there is no information before the panel to substantiate the matter being appealed.⁷⁴

Over forty percent of the appeals are filed from the Municipality of Metropolitan Toronto. The Central Region, which includes Toronto, accounts for over half of the appeals. In 1993-94, about sixteen percent were filed from the Eastern Region, twenty-one percent from the Western Region, nearly three percent from the Northern Region, and over seven percent from the Far Northern Region. Most hearings are held in English, while bilingual hearing panels conduct approximately two percent of the hearings in French. Interpreters are supplied in over

⁷² SARB, *Annual Report*, 1993-1994, at 11.

⁷³ In 1992-93, over 77 percent of the appeals where the appellant was represented by counsel were granted.

⁷⁴ SARB, *Annual Report*, above note 71, Table 14.

ten percent of the hearings for applicants speaking a language other than English or French, including sign language.

The decisions of SARB may be appealed or reviewed by the courts. In 1993-94, one application for judicial review and fourteen appeals were filed with the Divisional Court. Leave to appeal two Division Court decisions relating to SARB to the Court of Appeal was also sought. In the same time period, the Divisional Court heard two appeals from SARB decisions, while ten appeals were dismissed by the court registrar for delay or were withdrawn. While correctness is the standard applied by the courts in hearing an appeal of a SARB decision, deference to the expertise of SARB has been given in a judicial review.

SARB does not use alternative dispute resolution mechanisms to deal with its cases. In SARB's view, ADR is not appropriate both because of the unequal power relationship of the parties and because the nature of the dispute (the minimum level of financial support) leaves little room for mediation.

Several issues are raised by an examination of SARB:

- Rapidly increasing caseload: SARB is an example of an agency developed to deal with a large caseload. In recent years, its caseload has not only had a large proportional increase, but also a substantial increase in absolute numbers. The nature of the cases also means that the consequences of delay for applicants can be severe.
- Influence of bureaucratic administrative decisions on the caseload and functions of a tribunal: SARB is an appellate tribunal, hearing applications that were denied or where benefits were reduced by bureaucratic staff. The quality of the initial decisions, including consistency and fairness, has an important impact on the caseload and outcome of SARB's decision. To some degree, the processes and structure of SARB must be viewed as an integral part of a broader social benefits program.
- Large numbers of cases, with relatively short hearings: In general, the individual cases are not legally complex and depend on relatively few factual issues, although the consequences of the cases are of great importance to the individual applicants. SARB is the first level of appeal; there is no internal review by municipalities or the province to deal with simple errors, which are estimated to be over a third of the successful appeals.
- High proportion of disadvantaged clientele: By definition, SARB deals with a group of individuals who may have difficulties in dealing with a government bureaucracy and legal system. The issues of access and service equity are highlighted with SARB, perhaps more than almost any other tribunal.
- Noticeable differences in result depending on nature and quality of representation at hearing: This issue is particularly critical because of the importance of the entitlement to social benefits and the "Catch 22" nature of being too poor to afford help to obtain benefits that are intended to ameliorate poverty.

(b) THE CRIMINAL INJURIES COMPENSATION BOARD

The Criminal Injuries Compensation Board decides entitlements pursuant to the *Compensation for Victims of Crime Act*.⁷⁵ The victim may apply for compensation for injuries occurring in or resulting from a crime of violence. Injuries are also compensable if they occur while the victim was lawfully arresting or attempting to arrest a suspected offender, while

⁷⁵ R.S.O. 1990, c. C.24.

assisting a peace officer, or while preventing or attempting to prevent the commission of an offence against a person other than the applicant. An application may also be made by the spouse, child, parent, sibling or other relative of a victim if that individual was responsible for the support of or was dependent upon the victim. Compensation is not available for injuries from an automobile unless they were caused by assault with a motor vehicle.

A single member of the Board may hear the application. These hearing are often "paper" hearings, with the consent of the applicant. An applicant or the Minister (the Attorney General) may require a hearing and review by the Board of the single member's decision. The panel reviewing the first decision must consist of at least two members. The Board is subject to the *Statutory Powers Procedure Act*, except that the Board is not required to hold a public hearing when that would be prejudicial to the final disposition of the criminal proceeding or would not be in the interests of the victim.⁷⁶

Compensation may be granted even if the alleged perpetrator is not identified or convicted, or is not even legally competent to have committed the offence. The Board may consider any behaviour of the victim that may have directly or indirectly contributed to injury or death. The Board may also refuse to make an order or make a reduced order when the victim has failed to cooperate with law enforcement authorities. The maximum amount of an order for a single victim is \$25,000 or \$1,000 per month as a periodic payment. The total for all victims of a single occurrence is \$150,000 for a lump sum payment or a total of \$250,000 for periodic payments, divided among the victims *pro rata*.

The Board can vary an order due to new evidence, change of circumstance, or other relevant factors on its own initiative or on the application of the victim, a dependent of the victim, the Minister, or the offender. A decision of the Board is appealable to the Divisional Court on questions of law.

If the victim or dependent seeks civil damages, the Board is subrogated to all the rights of that person. An applicant or an individual awarded compensation must notify the Board of any action against the offender. The Board may also maintain an action against any person against whom an action might lie and the applicant must cooperate with the Board. Any amounts recovered by the Board will be first applied to the costs incurred in the action, then to the reimbursement of the Board. Any balance will be paid to the individual whose rights were subrogated. A settlement or release by the victim does not bar the Board's rights unless the Board has agreed to the settlement.

The Board, like many other agencies, is facing an increasing caseload. In 1993/94, it received 3,880 applications; in 1994/95, this number rose to 4,474. The Board has an active caseload of over 7,000 files; some cases were delayed because sufficient funds were not available for payments. It takes an average of twenty-two months for a case to move through the process from application to decision. A case management system is currently being implemented.

Not surprisingly, most claims relate to injuries incurred in various type of assault. The largest number relate to sexual assault (1,890 in 1994/95); the next most frequent sources of injury are assault causing bodily harm (830), common assault (713), assault with a weapon (388), robbery (217), and aggravated assault (177).

In 1994/95, about thirty-five percent of the cases were heard orally. Other cases are dealt with by "paper" hearings; the Board seeks consent of the applicant before dispensing with the

⁷⁶ In fact, the provisions of section 9 of the *SPPA* would permit *in camera* hearings for these reasons.

oral hearing (presumably because of the right to be heard by the Board on appeal from a one-member decision). The paper hearings and simpler cases are considered by one member. Hearings are held in centres around the province, including Sioux Lookout. The Board assists applicants in completing their applications and collecting the documentation necessary to support their claims. The Board itself requests police reports and may investigate to verify the evidence provided with the claims. Service is provided in English and French.

Issues raised by the Criminal Injuries Compensation Board include:

- The utility of a review by the Board of a single member's decision as of right: The Board must hold a new hearing. This can be compared to the usual criteria for review and rehearing (e.g., new evidence, inconsistency, obvious error) that will be applied generally by Ontario administrative justice system agencies in light of the empowering provisions of the *SPPA* amendments that authorize reviews of decisions.
- The funding for the compensation scheme affects case management: Funds for the payment of compensation are allocated in the Estimates process. When these funds are exhausted, the Board cannot award compensation and consequently delays its decisions.
- Access to the compensation and the Board process is a concern. The Board wants to ensure that citizens are aware of the Board's existence and their rights to pursue compensation. Efforts have been made to publicize the Board (through brochures, generally) at hospitals, rape crisis centres, and police stations. The difficulty has been in obtaining cooperation from persons not associated with the Board, such as medical personnel or police.

(c) THE WORKERS' COMPENSATION BOARD AND APPEALS TRIBUNAL

(i) The Workers' Compensation System

The Workers' Compensation system is a social insurance system.⁷⁷ In general, the coverage is compulsory, with some provisions for optional coverage. Employers are assessed a levy, which is paid into a common fund. Workers who are disabled as a result of employment are paid out of the fund. Benefits are paid without regard to the fault of the employer and usually without regard to fault of the worker.

It has been pointed out that:

There is a tendency for the governments who administer it and for the employers who pay for it to identify workers' compensation with other public programs for income maintenance....That attitude rests on an invalid premise. In truth, workers' compensation occupies an intermediate position between our two main legal models for reimbursing lost income: tort liability and social welfare. By contrast with the tort remedy..., workers' compensation does not aim at full redress for all damages....But by contrast with the social welfare system..., workers' compensation does aim to replace the bulk of the prior income lost by the injured claimant.⁷⁸

⁷⁷ See, Terence G. Ison, *Workers' Compensation in Canada*, 2d ed. (Toronto: Butterworths, 1989). For a general background on the development of the system, see, R. C. B. Risk, "This Nuisance of Litigation: the Origins of the Workers' Compensation System in Ontario," in David H. Flaherty, ed., *Essays in the History of Canadian Law* (Toronto: The Osgoode Society, 1983).

⁷⁸ Paul C. Weiler, *Reshaping Workers' Compensation for Ontario*, A report submitted to Robert B. Elgie, M.D., Minister of Labour, November, 1980, at 13-14.

The system represents a trade-off. The workers gave up their right to sue for full damages, including pain and suffering. In return, they acquired the right to compensation for industrial injuries, irrespective of fault. As Weiler notes, "An injured worker does not enjoy his form of compensation as a matter of grace. He has been required to give up a common-law right of action enjoyed by every one else."⁷⁹

The Workers' Compensation system has been subject to an array of studies; the Royal Commission conducting the most recent review of the system was disbanded by the new Conservative government in Ontario and a new Workers' Compensation Reform Project established. In 1993, the Workers' Compensation Board's total assets were \$6.7 billion and its liabilities were \$18.2 billion. The growing unfunded liabilities have raised fundamental political and policy questions of the scope of the program and its relationship to other tort-substitute personal injury compensation schemes.⁸⁰

(ii) The Workers' Compensation Board

The Workers' Compensation Board (WCB) administers the accident benefits scheme that compensates workers injured in the course of their employment or who suffer an occupational disease. The WCB is a Schedule III agency, which reflects its relative independence of government and its lack of reliance on the Consolidated Revenue Fund for support. Its administrative costs are funded from monies collected for the Accident Fund and investments; its employees are not employed under the *Public Service Employment Act*, but rather are crown employees.

The *Workers' Compensation Act* establishes two classes of employers.⁸¹ Schedule 1 employers pay assessments to the Accident Fund based on their industry and employees' earnings. Different industries are classified according to risk and industry-wide claim history. The Board is experimenting with an experience rating program (New Experimental Experience Rating: NEER); employers may have their payments increased or decreased according to their accident experience in comparison to other employers in the same industry. Allowable claims affect the experience rating of the employer.

The Schedule 1 employers do not directly pay compensation claims to their employees. These are paid by the WCB from the Accident Fund. The employers do pay assessments into the Fund, however. Most Ontario employers are included in the Schedule 1 collective liability scheme and about seventy-two percent of the Board's revenues are derived from Schedule 1 employers. Neither the employer nor the employee can opt out of the compulsory coverage scheme.

Schedule 2 employers do not contribute to the Accident Fund, but are directly responsible for compensating their workers for injury and occupational illness. As a matter of practice, the WCB makes the necessary payments and then collects the funds and an administration fee from the employer. The Schedule 2 employers will deposit money with the Fund, from which

⁷⁹ Id., at 15. A worker who elects to maintain a civil action cannot claim workers' compensation benefits.

⁸⁰ For an early discussion of a comprehensive scheme, see, Paul C. Weiler, *Protecting the Worker from Disability: Challenges for the Eighties*, A report submitted to Russell H. Ramsay, Minister of Labour, April, 1983, Chapter 3. For commentary on the New Zealand comprehensive compensation scheme, see, Rt. Hon. Sir Geoffrey Palmer, "New Zealand's accident compensation scheme: Twenty years on," (1994) 44 *U. of Toronto L. J.* 223.

⁸¹ R.S.O. 1990, c. W.11.

payments may be made. Among the Schedule 2 employers are the provincial government, municipal governments, and federal undertakings, such as banks, telecommunications companies, interprovincial railway companies, and airlines.

Some employers are not included in either schedule, often because of the small size of the firm (e.g., a self-employed individual). These employers may elect, however, to be covered in Schedule 1. The Federal Government, for example, has entered into an agreement to cover its employees. The employers who elect to participate are treated similarly to Schedule 2 employers.

The philosophy of workers' compensation includes limitation of the worker's right to sue; the rules in the Act governing civil actions are complex. Workers of Schedule 1 employers cannot sue their own employers or other Schedule 1 employers; they may, however, sue employers who are not Schedule 1 employers. Workers of Schedule 2 employers cannot sue their own employers, but may bring an action against other employers, including other Schedule 2 employers. To bring an action, the worker must make an election under the Act and will not be eligible for benefits if he or she elects to maintain a civil action.

Employers that are not covered by either Schedule 1 or 2 and their employees are covered by the general principles governing suits against employers. The common law in this area, however, has been amended by the Act.⁸²

The benefits to which a worker is entitled under the Act depend on the circumstances of the claim and the date of the injury. The date of the injury is important because the compensation scheme has been amended, and the new provisions apply only to injuries occurring after that date. The fact that different workers are subject to different rules and entitled to different benefits contributes to the complexity of the scheme.

Workers may be entitled to benefits for temporary wage loss; medical and physical rehabilitation; vocational rehabilitation services; and permanent disability benefits for claims arising before January 2, 1990. For permanent impairment claims arising after that date, future economic loss benefits ("FEL") and noneconomic loss awards ("NEL") may be awarded. The granting of the FEL and NEL benefits involves the application of complex legislation, WCB policy, and decisions of the Workers' Compensation Appeals Tribunal. The FEL benefit is reviewed twice after it is granted; the first review is two years after the initial determination and the second is three years after that. Workers may also be entitled to re-employment, possibly in a different capacity.

As noted above, in 1993, the Board's total assets were \$6.7 billion and its liabilities were \$18.2 billion. Its expenses in 1993 were \$3.308 billion, eighty-seven percent of which were for benefit payments. The largest component of benefit payments was for long-term disability. In 1993, the Board's revenues were \$2.804 billion, of which \$2.28 billion was received from employers and \$0.521 billion was from investments.

The Board is a large organization (about 5,000 employees across the Province) processing thousands of claims each year. It has regional and area offices, although certain functions are centralized in Toronto. The organization and the decision routes of the Board are complex to an observer; indeed, they may even be a model for the complicated and opaque bureaucracy that critics so often invoke in speaking of government organizations.

⁸² Id., ss. 140-42.

A new internal appeal system is being put into place by October, 1995 that should simplify the process and reduce the number of appeals. The existing system will be described first, and then the proposed system.

There are seven divisions in WCB, three of which are relevant for this paper. The Client Services Division makes most of the decisions dealing with entitlement to benefits, including determinations on ongoing entitlement. There are two specialized units within the Division that handle certain types of claims on a centralized basis in Toronto. The Complex Case Unit—Diseases is responsible for dealing with claims relating to occupational diseases, and the Complex Case Unit—Injuries deals with serious disabilities, including claims for FEL and NEL benefits.

The Finance and Administration Division is comprised of the Revenue Department, the Administration Department, and the Finance Department. The Revenue Department is responsible for the registration and assessment of employers. The Administration Department registers the claims and handles primary decision making on simple claims.

The Human Resources and Client Appeals Division handles appeals from decisions made in the Client Services Division (entitlement and benefits). It also handles appeals from decisions made by the Revenue Department (employer assessments). There are several appeal levels and routes.

Claims that are initiated by an Employer's Report of Accident (Form 7) are sent to the Primary Adjudication Section in the Administration Department (Finance and Administration Division). The primary adjudicator may be able to decide the claim on the basis of the form. If not, the claim is sent to an Integrated Services Unit (ISU) in the Client Services Division. Claims that are initiated by Form 6 (the Worker's Report of Accident) or Form 8 (Physician's First Report) are sent directly to the ISU.

The first step is for the entitlement adjudicator in the ISU to decide if the claimant is entitled to benefits. If entitlement is established, the size and duration of the benefits must be determined. Most benefits are set by the benefits adjudicator in the ISU, who may seek advice from medical or rehabilitation specialists. If the disability is severe or if the payment of FEL and NEL benefits is involved, the determination is made by the specialized unit, Complex Cases Unit—Injuries. Decisions about re-employment for workers injured after January 1, 1995 are made by an adjudicator in the ISU.⁸³

There are several layers to appeals within the WCB. Most worker and employer appeals follow a particular route, but there are other routes for appeals on employer assessments, re-employment obligations, and vocational rehabilitation.

A worker or employer may file an objection to a decision. The first step is for the initial decision-maker to review the decision. If the decision is not changed, it is referred to the Decision Review Branch in Toronto. The next step is for a decision review specialist to review the decision. This is a "paper" proceeding and does not involve oral testimony or argument. The *Statutory Powers Procedure Act* does not apply to the decisions of the WCB.⁸⁴

The decision of the review specialist may be appealed by a worker or an employer to the Hearings and Re-employment Branch. The Hearings and Re-employment Branch may provide

⁸³ Previously, the initial decisions on re-employment obligations were made by the Hearings and Re-employment Hearings Branch.

⁸⁴ *Workers' Compensation Act*, s. 73(1) provides that: "Any decisions of the Board shall be upon the real merits and justice of the case, and it is not bound to follow strict legal precedent but shall give full opportunity for a hearing."

mediation for certain types of decisions, but not for decisions relating to entitlement. If mediation is not successful, a hearings officer holds a hearing, allowing the parties an opportunity to make oral submissions or file written submissions. The parties may introduce witnesses and file documentary evidence. The hearing officer takes an inquisitorial attitude, questioning witnesses and, if necessary, seeking additional evidence.

Employers and workers may seek a fourth level of appeal by appealing the decisions made by the Hearings and Re-Employment Branch hearings officer to the Workers' Compensation Appeals Tribunal (WCAT).

The route for appeals from employer assessments made by the Revenue Branch is to the Employer's Assessment Committee in the Branch. If the Committee affirms the original decision, the case can be referred to the Decision Review Branch in the Human Resources and Client Appeals Division. If the decision is again confirmed, the employer may appeal to the Hearings and Re-employment Branch, where a hearings officer will hold a hearing. The Hearings and Re-employment Branch also mediates these matters. If the Branch is adjudicating and confirms the original decision, the employer may apply to the Branch for a reconsideration of its decision. As a fifth and last level of appeal, the employer may appeal to the Workers' Compensation Appeals Tribunal, whose decision is final (although subject to internal reconsideration).

As in the other appeals, the initial step for an objection to a decision relating to re-employment or vocational rehabilitation rights and obligations is reconsideration by the original decision-maker. If the decision is confirmed, the case goes directly to the Hearings and Re-employment Branch. Since April 3, 1995, mediation is mandatory in these cases; mediation had previously been optional. Mediation is offered by Board employees, who may not participate in any proceeding on the matter later without the consent of the parties. Most mediations are done by telephone, although complex matters may require face-to-face meetings. If mediation fails, the Board must make a decision on the matter within sixty days or "such longer period as the Board may permit."⁸⁵ The decision may be appealed to the Workers' Compensation Appeals Tribunal, whose decision is final (although subject to internal reconsideration).

Although the Board keeps detailed information about numbers of claims, reopened claims, complex cases, hearings, and reviews, the numbers require considerable interpretation. A simple claim may require only a single determination. Another claim involving a more serious disability may require decisions on entitlement, temporary benefits, medical rehabilitation, vocational rehabilitation, re-employment obligations, NEL and FEL benefits, and the required two reviews of the FEL benefits. Any of these decisions can lead to objections by the worker or the employer, producing decisions at the various appeal levels and culminating at the Workers' Compensation Appeals Tribunal. In a hypothetical litigious scenario, there might be more than twenty-five formal decisions and several hearings to deal with a single disability claim.

At the most basic level, the number of claims is large. Each working day, the Board receives approximately 1,500 claims. In 1994, a total of 374,246 claims were registered. In 1990, however, 479,731 claims were registered, dropping to 418,591 in 1991, and 382,426 in

⁸⁵ *Id.*, s. 22.

1992. The reduction is primarily due to the recession, but may also be partly due to the maturing of the experience rating system and an increased consciousness of worker safety.⁸⁶

The Board has set performance standards for processing of files: the entitlement decision and authorization of payment should be made in eighty percent of the cases (excluding complex cases and federal employee claims) within four weeks; ninety-five percent should be processed within eight weeks; and all should be processed within twelve weeks. The standards for the more complex cases or federal employee claims are fifty percent within four weeks; seventy-five percent within eight weeks; ninety percent within sixteen weeks; and one hundred percent within twenty-four weeks. The statistics for 1994 indicate that the Board was close to meeting the performance standards for the first group of cases (noncomplex and not involving federal employees). It was less successful in meeting its standards for the complex cases (e.g., averaging fifty-seven percent of the cases completed within eight weeks in comparison to the objective of seventy-five percent or averaging eighty-one percent within sixteen weeks in comparison to the standard of ninety percent). In contrast, it exceeded its performance standards for claims involving federal employees.

The data for the time taken to resolve the first level appeals by the Decision Review Specialists indicate that it takes about fifteen to twenty weeks for the decision to be rendered. When the Hearings and Re-Employment Branch holds a "paper" hearing with written submissions, the decision is generally rendered within three months of receiving the application for the hearing. When an oral hearing is held, it takes three to four months to set the date for the hearing, which may be nine months in the future. The hearings themselves range from an hour to several days and decisions are usually rendered within four to six weeks after the completion of the hearing.

The available data does not give full information about the results of the various levels of review/appeal. However, in 1994, there were 24,515 decisions rendered by the Decision Review Branch. Of these, twenty-one percent of the appeals were granted in whole or in part. In 1994, 14,115 applications for hearings were received; this is an increase over the 11,027 applications received in 1993 and the 5,957 received in 1992. The effects of Bill 162 passed in 1990, which introduced a wage loss system, are the primary reason for the increase in applications for appeals. The Bill provided for greater discretion in the setting of compensation and increased the potential for disagreement. It also increased the types of benefits and, consequently, the number of decisions being made. The backlog that had developed means that at the end of 1994, approximately 14,000 cases were at different levels in the appeal system awaiting resolution. Several measures were initiated in 1994 to deal with the backlog. Individual hearing officers increased their caseloads and additional people were assigned to appeals. More decisions were taken on the basis of documents, without oral hearings.

In 1994, 7,666 hearings were held; this compares to 4,724 in 1993 and 4,572 in 1992. In 1994, thirty-eight percent of the appeals were granted, with an additional fourteen percent being granted in part. In earlier years, the percentage of successful appeals was higher (e.g., fifty percent in 1991 and forty-seven percent in 1992). The contrast is less strong in absolute numbers, however (e.g., 1,679 in 1992 and 1,958 in 1994).

Most employers and employees are not represented by counsel or other experienced agents when the claim is filed and the initial decision is made. When decisions are appealed,

⁸⁶ It may also be due to an increase in informal arrangements (such as direct payments) between injured workers and employers who fear an increase in their assessments.

however, there is a tendency to seek representation. Workers are represented by unions, legal clinics, private consultants, and lawyers. Employers are represented by private consultants, lawyers, and their own health and safety expert employees. The Ministry of Labour's Office of the Employer Advisor and Office of the Worker Advisor, which are funded by the WCB, provide assistance in making appeals at no cost to the individual employer or worker. There is no data on the comparative success rate of represented and unrepresented appeals.

Hearings by the Hearings and Re-employment Branch are held in Toronto or in one of the six cities in which a regional office is located. The Board pays the parties' travel expenses if the hearing is not where they reside and it may also pay reasonable expenses for necessary witnesses. Hearings are conducted in either English or French and interpreters are provided for other languages.

Written reasons are provided for decisions on claims, employer assessments, decision reviews, and hearings. The decisions are not published, although decisions on re-employment and vocational rehabilitation are available in the WCB and WCAT libraries.

In October, 1995, the WCB will be changing its internal appeal system. The changes deal with several issues that are raised by the existing system, including the multiple internal review and appeal procedures. The WCB had identified problems in addition to duplication of decision-making. In particular, it was concerned about the individual focus on issues and the inability to take a comprehensive approach. The individualized, piecemeal approach led to duplication of effort, delays and results that might not effectively solve the problem presented by the case. There was little capacity to distinguish between issues that required a full oral hearing with extensive fact-finding and those that were more straightforward. On the other hand, the information in the file was not always adequate to resolve matters in paper hearings.

The integrated appeal system involves more extensive decision-making and information-gathering by the Client Services. The objective is to have more comprehensive decision-making in appeals and to eliminate the delay and low client satisfaction caused when relevant information is missing or important issues are not being addressed. Discussions, which appear to be analogous to the prehearing conferences held by some agencies, between the appeals officer and the parties will try identify issues and choose the method of solving the dispute. Emphasis will be placed on information-gathering at this stage. When the file is complete, a decision will be made, which will be a final decision for the WCB. The additional appeal to the Workers' Compensation Appeals Tribunal remains. Thus, the multiple appeal levels within the WCB will be eliminated and a greater effort will be made to deal comprehensively and competently with the single appeal.

Issues raised by the Workers' Compensation Board include:

- Multiple internal review and appeal procedures: Is there an incentive to commit a higher number of errors knowing there may be opportunities to fix it (note the nearly fifty percent success rate at the Hearings and Re-employment Branch stage)? WCAT has noted an increased tendency for decisions to be appealed at all levels. This aspect of the appeal system in the WCB will be radically changed with the implementation of a new system in October, 1995.
- Delays in holding oral hearings at the Hearings and Re-employment Branch appeal stage. The new appeals system should help eliminate the backlogs.
- Relationship to next level appeal tribunal (i.e., WCAT): Should appeals to WCAT be of right or only by leave of the Tribunal? For example, should WCAT hear a case only where a new issue of policy is involved or where there is an obvious error in the lower

decision? Is the appropriate standard of review “correctness,” or would “reasonableness” be more appropriate?

- What role do guidelines and other public policies play? How is consistency ensured for the multi-thousand decisions?

(iii) The Workers’ Compensation Appeals Tribunal

The Workers’ Compensation Appeals Tribunal (WCAT) hears worker or employer appeals from final decisions made by WCB hearing officers. WCAT also has the jurisdiction to hear employer assessment appeals, to decide whether the *Workers’ Compensation Act* has removed a worker’s right to sue in the courts, to determine disputes over employers’ access to workers’ files, and to deal with workers’ objections to medical examinations requested by employers.

WCAT was organized in 1985 as part of a broader reform of the workers’ compensation system in Ontario. It is a tripartite body with representation from the employers’ and workers’ communities; panels are chaired by a nonpartisan vice-chair. It is separate from the Workers’ Compensation Board and is the final level of appeal under the *Workers’ Compensation Act*. There is no appeal to the Divisional Court. WCAT’s decisions are protected by a privative clause, but fifty-three applications for judicial review were made between 1985 and 1994. The Board of Directors of the WCB has the right pursuant to section 93 of the Act to review decisions of WCAT and direct a change in WCAT’s interpretation. The WCB is responsible for enforcing WCAT orders. WCAT is not subject to the *Statutory Powers Procedure Act*, but procedural rules may be made by regulation. No procedural rules have been developed, but the Tribunal has issued a number of practice directions.

WCAT is instructed by statute not to consider itself bound by precedent and to make its decisions on the “real justice and merits of the case.” The Tribunal has made clear that it does not hear appeals in the same sense as a court might, but rather rehears the matter by considering the same evidence considered by the final WCB appeal level and any new evidence, including evidence obtained by the Tribunal on its own initiative.⁸⁷ The Tribunal regards its task as asking: Did the Board get the facts right? Did the Board get the medical facts right? If so, are the Board’s conclusions concerning the consequences that follow from those facts based on a correct interpretation of the Act? If the answer to any of these questions is “no,” what consequences does the Act specify, given the correct conclusion based on the facts?⁸⁸ The Tribunal considers active investigation and intervention to be appropriate components of its adjudicative role. In 1994, for example, WCAT spent approximately \$250,000 on outside experts, primarily medical experts, so the Tribunal would have better advice available to it in its decision-making.

Like many other Ontario tribunals, the WCAT has experienced an increase in both numbers and complexity of cases. In 1990, for example, the Tribunal received 1,519 appeals; in 1994, the number had grown to 2,197. In terms of number of cases heard, 1,096 were heard in 1990, while 1,155 were heard in 1994.

The reasons for the increased caseload include changes in legislation, interpretations of the Act by WCB Decision Review Branch officers that are known to conflict with the

⁸⁷ WCAT, 1985-86 *First Report* at 4, quoting Technical Appendix to Interim Decision No. 24, “Explanation of the Tribunal’s Adjudication Process.”

⁸⁸ *Id.* at 5.

interpretations of WCAT, and increased resources from unions and government available to worker advocacy centres. There is an increasing tendency for WCB rulings to be appealed at all levels of the system through to the WCAT. The Tribunal has also noted that legislative reforms enacted in 1990 have increased the complexity of the cases that come before it, particularly re-employment cases.⁸⁹

The restructuring of the WCB appeal system will reduce the number of appeals that go to review within WCB. Once a case has reached the "final" stage at the WCB, however, it may be appealed to WCAT. Thus it is likely that appeals to WCAT will be made at an earlier stage and not be "filtered" by the final WCB hearing stage.⁹⁰

WCAT has dealt with the increased caseload in several ways. It changed its scheduling strategy by unilaterally fixing a hearing date about four months in advance. Parties may still negotiate a change in dates, but the obligation is on the parties to reject the scheduled date and find a substitute. The workload of the Scheduling Department thus was decreased. Parties are also encouraged to remove cases that are not ready for hearing. Prehearing telephone conferences are used for out-of-town hearings to narrow issues and reduce surprises, thereby reducing the possibility of adjournment at the hearing. The Tribunal also requires prehearing disclosure of evidence and the exchange of documents and "will say" statements.

The members are experimenting with streamlining reasons by incorporating WCB hearing officers' reasoning by reference where appropriate and reducing background information that is known to the parties. The Tribunal has developed *Guidelines for Review of Draft Decisions* to deal with institutionalizing of decisions in the light of the Supreme Court's decisions in *Tremblay v. Québec (Commission des affaires sociales)*.⁹¹ The review process is aimed at ensuring the quality and consistency of decisions while, at the same time, respecting the hearing panel members' independence and autonomy. Members must initiate any review of their draft decisions, but are asked to keep in mind their responsibilities as adjudicators to ensure that their decisions are consistent with decisions on like issues unless the prior decisions can be distinguished on their facts or are wrong. Review of decisions may be particularly indicated when the decision addresses a new issue, may be controversial, departs from previous practice, affects the WCB's policy or practice, or involves a dissent on a significant issue. The Office of the Counsel to the Chair is responsible for the review process.

Nearly ninety percent of the WCAT hearings are oral, with procedural applications (e.g., requests for reconsideration) being dealt with in written hearings. Written reasons accompanied 856 of the 875 cases disposed of after hearings in 1994. The reasons are key worded and indexed and available through a commercial service. Significant cases are published in the WCAT Reporter, published by the Tribunal.

A number of cases (908 in 1994) were closed without hearings. While the Tribunal does not offer mediation or alternative dispute resolution processes as such, these cases tended to be closed after the explanations of the rights of workers, the intricacies of the Act or the nature of

⁸⁹ The amendments of Bill 162 require employers to re-employ injured workers.

⁹⁰ In light of the proportion of cases being appealed, it is questionable how much "filtering" is being done.

⁹¹ (1992) 90 D.L.R. (4th) 609. The Guidelines are reproduced in the 1992-93 *Annual Report*. See also, Ron Ellis, "Comments on the Institutionalizing of Tribunal Decisions," in Special Lectures of the Law Society of Upper Canada, 1992, *Administrative Law: Principles, Practice and Pluralism* (Toronto: Carswell, 1993).

the appeal process were given to the parties.⁹² Some form of mediation is possible to deal with worker opposition to employer-sponsored medical examinations or access to the worker's medical records, but substantive issues cannot be mediated because of statutory prohibitions against the waiver of rights by the worker.

In 1994, the median time between the filing of an application and the first hearing was 235 calendar days. There was a wide variation in the processing times for different types of applications ranging from twenty-one days for reconsiderations to 247 days for leave and entitlement cases. Additional evidence may be filed after the hearing and hearings may also continue after adjournments. The median time between the completion of all hearing and posthearing processes and the release of the final decision was forty-seven days in 1994. As with processing time, there was a variation according to the type of case in the time required for compilation of all evidence followed by the decision-making and writing. Final decisions were typically made within twenty-nine days after the end of the hearing for medical exam and access to file cases, while right to sue cases required 104 days of posthearing investigation, consideration and decision-writing.

The length of time for a case to progress from start to finish therefore varies considerably according to type. Questions relating to medical exams and employer access to workers' files typically took forty-seven days between the application and the closing of the file. Cases involving the worker's right to sue in court averaged 325 calendar days, while leave and entitlement cases took 306 days. The Tribunal also collects data on the time elapsed between the opening and closing of files dealing with investigations by the Ombudsman, requests for reconsideration, and judicial review applications.

WCAT offers hearings in French by bilingual panels and provides signers for deaf parties or witnesses. All facilities used by WCAT are wheelchair accessible.

After three years' of experience with its legislation in 1988, WCAT approved a "Statement of Mission, Goals and Commitments."⁹³ The mission portion sets out what WCAT understands to be its statutory obligations, e.g., to be independent, competent, unbiased, and fair-minded. The appropriate adjudication process must not be "adversarial" as that term is generally understood; rather, the process is inquisitorial. The Statement notes that: "Unlike a court, the Tribunal is not engaged in resolving a contest between private parties. Appeals to the Tribunal represent a stage in the workers' compensation system's investigation of the statutory rights and benefits flowing from an industrial injury."⁹⁴

In terms of Goals, the Tribunal seeks to complete average cases within four months. The environment should be welcoming, empathetic, and nonintimidating. The system should, as far as possible, meet the statutory imperatives regardless of the experience or capabilities of the worker's or employer's representative or the absence of a representative. Maintaining a sufficient complement of qualified members, medical assessors, and administrative or professional staff is an additional goal. The Commitments also set out the "hallmarks of good-quality adjudicative decisions." These include: clear evidentiary base for the decision, consistency with previous decisions unless the conflict is expressly identified and reasons for

⁹² Data based on response to questionnaire distributed by the Ministry of the Attorney General.

⁹³ Reprinted in the *Third Report*, 1987-88, and the *1989 Annual Report* of WCAT; approved October 1, 1988.

⁹⁴ *Third Report*, id., p. 24.

disagreement are provided, consistent use of technical and legal terminology, and conformity with applicable statutory and common law.

Additional commitments are to holding hearings in appropriate out-of-Toronto locations, paying expenses and lost wages arising from attendance at the hearings, paying for necessary medical reports, and being fiscally responsible in the management of its expenditures.

Several issues are raised by WCAT:

- It is an example of an inquisitorial tribunal: Many tribunals (including most economic regulators) play an active role in developing and seeking out evidence. This puts obligations on these tribunals in terms of the quality of appointments and maintaining competent staff. It also raises the question of whether greater emphasis should be placed on information-gathering at the WCB level.
- The relationship of an appeal tribunal to the first level decision-makers: In particular, conflicts in interpretation of the Act create incentives for appeals, increase the number of appeals and may negatively affect the reputation of the system. The mechanism for reconciliation of interpretations and policies (i.e., section 93 of the *Workers' Compensation Act*) does not appear to be successful.
- How many levels of appeal are appropriate? Should WCAT be operating as an expert appeal body dealing with cases with precedential value, complex cases, and cases in which an obvious error has been made? Should appeals be with leave only rather than as of right? Should WCAT reverse decisions of the WCB only when they are unreasonable, as opposed to "incorrect"? Should the number of appeals available at WCB be reduced, with greater emphasis at WCAT? Is there an incentive for errors at the WCB? It may be noted that several of these issues will be addressed by the new appeals system to be implemented at the WCB that will reduce the number of appeals and, it is hoped, improve the quality of the decision-making.
- While extensive statistics are kept on the caseload and other information relating to the WCB and WCAT, there appears to be little information about where the conflicts that result in reversals occur. For example, do most WCAT decisions that overturn WCB decisions reverse decisions that were consistently upheld at the WCB, i.e., is there a divergence between the two institutions? Or is the pattern less clear?
- The effect of actions taken at the first level on the caseload and role of the tribunal: The process followed by the WCB apparently increased the likelihood of appeals going through the system as far as the WCAT. Should the process of the two bodies been viewed more clearly as an integrated process for the purposes of planning and determining the policy of the organizational structure and relationships of the two bodies?
- WCAT presents an example of an agency dealing with increasing caseload and case management techniques where mediation is not considered an appropriate technique to reduce caseload. It may be noted, however, that the WCB is placing greater emphasis on mediation to solve disputes.
- What is the scope for generic proceedings and rule-making?

(d) THE ONTARIO INSURANCE COMMISSION

The Ontario Insurance Commission regulates all types of insurance companies operating in the province, including life, property and casualty, reinsurance companies, and fraternal or mutual benefit societies. It supervises the solvency and market conduct of licenced insurance companies and brokers. It provides protection to persons injured in motor vehicle accidents in

Ontario where no other insurer is involved. It also resolves disputes between claimants and insurers over accident benefit entitlement.

The dispute resolution services were set up following the 1990 amendments to the *Insurance Act*, which mandated statutory no-fault accident benefits.⁹⁵ Its purpose was to create a faster and more efficient system of dispute resolution and to reduce the need to go to court.⁹⁶

The Dispute Resolution Group of the Ontario Insurance Commission (OIC) deals with disputes about automobile accident claims relating to personal injury. It does not deal with claims for property damage or other types of damages. The personal injury claims typically concern income replacement and supplementary medical and rehabilitation benefits.

When an individual is injured in an automobile accident, he or she is entitled to claim statutory benefits from the insurer of the owner of the automobile involved. The injured individual files a claim with the insurance company (or possibly with an independent claims adjuster or broker working on behalf of the company). Most claims are resolved at this stage. In some cases, the insurance company may have internal review mechanisms to deal with difficult cases.⁹⁷ Unresolved claims, however, may end up at the Insurance Commission and be dealt with in their Dispute Resolution Group.

There are three functions in the Dispute Resolution Group: mediation, arbitration, and appeal. The mediators and arbitrators are civil servants appointed by the Insurance Commissioner upon the recommendation of the Accident Benefits Advisory Committee.⁹⁸ The Director of Arbitration assigns cases to the mediators and arbitrators and she, or her designate, is responsible for hearing appeals from arbitration decisions. The *Statutory Powers Procedure Act* applies to the arbitrations and appeals. Procedures are also governed by the *Insurance Act* and Regulations, as well as a *Dispute Resolution Practice Code* developed pursuant to the authority of the Director to make rules under section 12 of the Act. The regulations under the Act also prescribe standards with which all settlements must comply.

Mediation is the first stage of dispute resolution at the Insurance Commission. Parties may not proceed to another stage unless mediation has been tried and failed. A mediator is appointed within two working days of the filing of the application for mediation and the mediator has sixty days in which to attempt to reach a settlement, unless the parties agree to extend the time. Most mediations are held by telephone and the mediation is confidential. What happens at a mediation is not available to the arbitrator or to the Director on an appeal. The mediation stage is finished when a settlement is reached or the mediation fails. A mediation fails when the deadline passes without settlement or when the mediator notifies the parties that in his or her opinion, the mediation will fail. The Mediator's Report is filed with the Commission and sent to the parties. The Report outlines the issues that were resolved and the outstanding issues; it includes the insurance company's last offer. The mediator does not provide an opinion on the positions taken by the parties.

⁹⁵ S.O. 1990, c. 1.8.

⁹⁶ Ontario Insurance Commission, *Annual Report 1993-94*, at 15.

⁹⁷ H.W. Arthurs, *A Review of Advocacy and Dispute Resolution in the Ontario Automobile Insurance System*, August, 1993.

⁹⁸ Issues relating to the appointment process and the terms and conditions of appointment of order-in-council members, therefore, do not apply to the mediators and arbitrators at the Insurance Commission.

The injured person whose claim was not settled by mediation may choose to apply for an arbitration at the Commission or may bring an action in court. If the insurance company wishes to continue rather than settle, its only choice is to commence a court action. The arbitration route, in other words, can only be triggered by the claimant. More than half of the claims that remain unsettled after mediation are presented for arbitration.

The person making a claim may apply for an appointment of an arbitrator within ninety days of the filing of the Mediator's Report. Within two days, two arbitrators are appointed. One will hear the arbitration; the other acts as a prehearing arbitrator. The prehearing discussions are usually held by phone and have several purposes: to settle the dispute; deal with preliminary and procedural matters; clarify the issues; and ensure that all necessary evidence and documents have been exchanged and will be before the arbitrator. The arbitration date is set during these discussions and is usually about two months later. Almost all arbitrations are conducted through an oral hearing.

The *Arbitrations Act* does not apply to these arbitrations, but the Practice Code deals with such matters as pleadings and time limits. Most arbitrations are oral hearings. Questions may be referred by the Director to advisory panels on the recommendation of the arbitrator. Questions relating to medical condition, treatment or rehabilitation are referred to the Medical and Rehabilitation and Advisory Panel, which may appoint a member of the panel to conduct a medical or rehabilitation assessment. Copies of the report are sent to the Commission, the arbitrator and the parties. The arbitration decision and reasons are written and supplied to the parties.

Either party may appeal an arbitration decision to the Director. The Director or her nominee may decide the appeal on the record, may rehear the issues that were before the arbitrator, or may rely partly on the record and partly on a rehearing. The first stage of an appeal is consideration of written submissions or oral argument on the question of whether there should be a rehearing on some or all issues. If a rehearing is warranted, that is the second stage of the appeal proceedings. To date, there have been no rehearings of all the issues. There is no appeal from the Director's decision; judicial review is available, of course. Written reasons are provided for appeal decisions.

Either party may also apply to the Director to vary or revoke an order of an arbitrator or a previous order of the Director. An order may be varied or revoked where material circumstances of the claimant have changed, where there is new evidence that was not available at the time of the arbitration or appeal, or where there is an error in the earlier order.

The caseload of the Commission has increased. Applications for mediation have grown from 2,763 in 1992-93 to over 5,000 in 1993-94, to over 8,440 in 1994-95. In the past three years, approximately 2,000 total applications for arbitration have been filed by insured individuals. As noted, the insurance companies cannot trigger an arbitration, but must use the courts when a mediation has failed. The insured party has a choice between continuing with the Commission process or using the courts. In 1994-95, 8,098 mediations were held; of the 2,025 claims that were not settled by the end of the mediation, fifty-five percent went to arbitration.

No data have been kept on what happens to the disputes where the insured party has not chosen arbitration. It would be interesting to know, for example, the settlement rate of these cases or whether the disposition differs significantly from those that are arbitrated. How many of these cases actually began the court route? How do the time and expense compare? Are there any special characteristics of the cases that go to the courts? What factors influenced the

choice? Did it indicate dissatisfaction or distrust of the Commission process? The Commission experience provides a rare opportunity to directly compare two processes.

A large proportion (seventy-five percent) of the applications for arbitration either do not proceed to the oral arbitration hearing or are settled during the arbitration. Approximately half of the applications are settled by the prehearing discussions, while others are settled during the arbitration or prior to the arbitration by the parties themselves. Some applications are abandoned. In 1992-93, fifteen appeals to the Director were filed; in 1993-94, forty appeals were filed. In the past three years, only six applications to vary or revoke orders were filed. The Commission has dealt with the increased caseload by adding mediators and arbitrators.

The Commission expects its caseload to increase as the system matures. A number of either undisputed or settled claims may become active as the weekly income replacement benefits cease and the insurance companies dispute claims for "loss of earning capacity" benefits that may continue indefinitely.

The Commission mediates, arbitrates and hears appeals in both English and French. Interpretators and signers for the deaf are provided for arbitrations and appeals, and people are encouraged to bring a friend or family member to assist them in a mediation if they do not speak English or French. The offices are accessible to people with disabilities.

Parties are more likely to use counsel as the claim progresses through the various stages. The greatest disparity of representation of the parties is at the mediation stage, with sixty-eight percent of insurance companies using legal counsel, while only eleven percent of the insured do. At the arbitration stage, seventy-seven percent of the insurers use counsel, but eighty-nine percent of the insured have legal representation. The insured use counsel ninety-nine percent of the time for appeals, while the insurance companies use them seventy-nine percent of the time. It is likely, however, that even "unrepresented" insurance companies are represented by experienced personnel for whom these proceedings are a routine part of their work. There is no data with respect to outcome (e.g., comparison of award sizes or likelihood of a "failed" mediation) in relation to legal representation.

The cost of the Dispute Resolution Group is essentially paid by the insurance industry. The Commission can therefore give a fairly accurate estimate of the costs of a mediation (\$500) and an arbitration (\$3,000). A claimant must pay a fee of \$100 when applying for the appointment of an arbitrator and the insurer party is assessed \$2,000. The party that files an appeal from an arbitrator's decision must pay a \$250 filing fee and insurers are also assessed \$500. The fees for an application to vary or revoke an order is a \$100 filing fee and a \$500 assessment on the insurer. Arbitrators and the Director have the discretion to award expenses to the claimant and the insurance companies are generally required to pay the claimant's expenses as long as the process was not abused. The insurer can also recover from a claimant if an arbitration or appeal is frivolous or vexatious.

The mediation stage takes, on average, sixty-two calendar days to complete from the application for appointment of a mediator to the filing of the Mediator's Report. Approximately 119 days elapse from the application for an arbitration to the hearing date, and then an additional 102 days from the conclusion of the hearing to the issuance of the decision. The appeal to the Director takes approximately 183 days.

Several issues are raised by the Insurance Commission:

- It is a clear and recent substitute for tort litigation and provides some opportunities for direct comparison in terms of cost, time, client satisfaction, outcome. Not all the

necessary data have been kept, however, and an opportunity has been lost to more directly compare and gain information about two systems of dispute resolution.

- The costs of the process are borne by the industry: This is to be compared to the costs of the courts, which are financed from the Consolidated Revenue Fund.
- The process deals with clients who are disadvantaged, in the sense of being subject to injury and stress. Does the agency have techniques and processes that other agencies can learn from in creating their service equity plans?

(e) THE EMPLOYMENT STANDARDS ADMINISTRATION

The Employment Standards Administration is part of the Ministry of Labour. It is an example of adjudication done by civil servants within a ministry rather than by a separate agency. The Office of Adjudication administers hearings under the *Occupational Health and Safety Act*⁹⁹ and the *Employment Standards Act*.¹⁰⁰ These are treated as separate adjudicative streams by the Office.

(i) Occupational Health and Safety

The Ontario *Occupational Health and Safety Act* requires the establishment of a joint worker-management health and safety committee in workplaces employing more than twenty employees.¹⁰¹ The intention was to train and certify members of committees in accordance with standards developed by the Workplace Health and Safety Agency.¹⁰² In a workplace with more than five workers but that does not need a committee, the workers must select a health and safety representative from among themselves. The Act gives workers the right to know about workplace hazards, the right to participate in controlling the hazards, and the right to refuse dangerous work. The Act and regulations also prescribe certain procedures, equipment and protective devices to avoid or reduce injuries.¹⁰³ The Act prohibits an employer from disciplining or dismissing an employee who has acted in compliance with the Act or the regulations.¹⁰⁴

The first level of enforcement under the Act is the self-regulation by the workplace health and safety committee. The next level is by Ministry of Labour inspectors, who have a wide range of investigatory and enforcement powers. Inspectors who find a breach of the law can order compliance, either immediately or within a specified time. They can issue a "stop work"

⁹⁹ R.S.O. 1990, c. O. 1.

¹⁰⁰ R.S.O. 1990, c. E.14.

¹⁰¹ A joint health and safety committee may also be required where the employer has been ordered pursuant to the Act to establish a committee or in a workplace of fewer than twenty employees but where a regulation regarding designated substances applies. Construction projects lasting less than three months are not required to have committees.

¹⁰² The Ontario Government has recently announced the disbandment of the Workplace Health and Safety Agency.

¹⁰³ See, Ontario Law Reform Commission, *Report on Avoiding Delay and Multiple Proceedings in the Adjudication of Workplace Disputes* (Toronto: OLRC, 1995) for a description of the workings of the Act.

¹⁰⁴ The Ontario Labour Relations Board has the jurisdiction to deal with complaints that an employer has disciplined or discharged an employee for refusing to do work he or she believes is unsafe.

order that can be further enforced by an injunction. The employer can appeal an inspector's order to the Office of Adjudication. Furthermore, a worker or a union can appeal either the inspector's order or the refusal to issue an order. The inspector is a party to the appeal.

An inspector may also choose to lay charges in the courts under the *Provincial Offences Act*. This may be done where the employer has not complied with the orders of the inspector or where the breach of the Act or regulations is serious and likely to jeopardize the safety of the worker. An injured worker may also have a private right of action under civil tort law, subject to the provisions of the *Workers' Compensation Act*, as discussed above.

In most cases, however, disputes about an order under the Act are dealt with by the Office of Adjudication. An occupational health and safety adjudicator is appointed by the Lieutenant-Governor-in-Council under the *Occupational Health and Safety Act*. The adjudicator, in turn, may delegate powers and duties to members of the Office of Adjudication. Five full-time members have been empowered to hear health and safety matters. The hearings are governed by the *Statutory Powers Procedure Act*, and the adjudicator can suspend the inspector's order or decision while the appeal is pending.

The adjudicator has broad powers and can substitute findings for those of the inspector, rescind or affirm the order, or issue a new order. There is no appeal from the adjudicator's decision, which is protected by a privative clause.

The adjudicator also has specific powers with respect to work stoppage for safety reasons. Normally, both the worker and employer representatives on the safety committee must agree to order work stopped. In some cases, however, a single member (in practice, the worker member) may be authorized by the adjudicator to order the stoppage of work. The adjudicator may also order the assignment, at the employer's expense, of an inspector to oversee the workplace. The criterion for such an order is that the employer has "demonstrated a failure to protect the health and safety of the workers." No other criteria have been prescribed. The adjudicator may also hear complaints that a certified member of a safety committee has acted recklessly or in bad faith.

The bulk of the Office of Adjudication's work under the *Occupational Health and Safety Act* involves orders or decisions of inspectors. In 1993, for example, all the 138 files dealt with appeals or suspensions of inspectors' orders or decisions. In 1994, all but two of 260 files dealt with appeals or suspensions. The increase is due partly to new legislation (Bill 208 and Bill 175) and the increased tension in some workplaces, such as correctional institutions. The Office maintains records on the types of workplaces from which complaints are filed, although not on the subject matter of the complaints themselves. Nonetheless, the range of workplaces gives an indication of the subject matter.

A number of appeals are filed from correctional institutions. The issues generally deal with refusals to work, identification of what is inherent in the work of correctional officers, and reasonable precautions. Smoking in the workplace, which is an air quality issue, also arises in correctional institutions. Health facilities are also sources of a number of appeals. The issues there tend to deal with reasonable precautions and includes such matters as staffing levels and dangers inherent in such workplaces. Industrial workplaces are often the source of complaints dealing with air quality and ergonomics (e.g., lifting, lighting, guarding of machinery). There are specific issues in the automotive industry relating to air quality and the use of certain substances, such as isocyanates.

It may be noted that a number of issues may arise in one workplace and, in some cases, similar issues may arise in several workplaces. While there is a high factual component in these decisions that may require consideration of individual workplaces, there is scope for

either consolidating all the files pertaining to one workplace or for considering a particular subject matter generically.

A number of cases settle before the hearing or on the first day of the hearing. The Ministry of Labour is responsible for mediation and settlement efforts prior to the hearing. The percentage of settled cases may be as high as eighty percent. The cases that go on for a full hearing tend to be the more complex cases.

In 1993, thirty-seven decisions were made on such issues as work refusal or reasonable precautions (staffing); air quality; reasonable precautions (protective clothing); and the jurisdiction of the adjudicator. In 1994, forty-eight decisions were made on such issues as work refusal (likely to endanger; right to refuse); construction safety (guardrails; toilets), and air quality. The number of decisions made do not necessarily reflect the number of cases filed in a given year.

For a case requiring only one or two hearing days, the average duration of the process is six to nine months from the date the appeal is filed to the release of the decision. The duration of the process and the length of the hearing itself depend on a number of variables, however. These include the issue, its complexity, the parties, intervenors, number of witnesses, expert testimony, need for viewing the workplace, and the time required to review the evidence and write the decision. Increasingly, the cases going to hearing are more complex and require multiday hearings which may be spread over as long as a year. In a complex case, it may take six months for the adjudicator to review the evidence and issue the decision after the last day of the hearing.

The Office is examining methods of reducing delay, including introducing a computerized case management system, formalizing prehearing conferences to induce settlement, and experimenting with scheduling innovations to reduce the inefficiencies in the use of adjudicator's time caused by high last minute settlement rates.

The issues raised by the Occupational Health and Safety jurisdiction of the Office of Adjudication include:

- The coordination with the role of mediation performed by the Ministry of Labour officials: Should mediation be mandatory and if so, should it be done by the Ministry or the Office of Adjudication? Should mediation be combined with a mandatory prehearing conference?
- The use of mandatory prehearing conferences to encourage settlement prior to the commencement of the hearing.
- The potential for broader hearings: Should issues relating to one workplace or to several similar workplace be consolidated into one proceeding? Should the adjudicators consider single subjects in generic hearings?
- The potential for rule-making: Should the Office of Adjudication have the power to elaborate standards taking into account the experience and fine-tuning of an adjudicative agency?

(ii) Employment Standards

The *Employment Standards Act* sets out the standards on minimum wages, maximum hours of work, overtime pay, public holidays and paid vacations. It sets out entitlements to severance pay and termination pay and covers pregnancy and parental leave. It provides for equal pay for equal work. No one can contract out of the standards under the Act, which are only

minimums. The Act also does not affect any civil remedies an employee may have against an employer.

Employment standards officers are appointed to enforce the Act. The Employment Standards Branch has a heavy workload, receiving approximately one million inquiries a year and 20,000 formal complaints.¹⁰⁵ An employment standards officer follows up each complaint. They have broad investigatory powers, including power to enter premises at reasonable times to carry out an inspection or audit.¹⁰⁶ They may require the production of documents, records, and accounts and make relevant inquiries of any person. The employment standards officer can order an employer to pay wages directly, place wages in trust, or receive the wages on behalf of the employee. The officer may also refuse to issue an order after a complaint is filed by an employee if the officer finds that the employer has paid the wages. The officer can also order an employer to take action or refrain from taking action relating to pregnancy and parental leave, can order compliance with Part XII of the Act relating to lie detector tests, can order reinstatement and compensation of any employee disciplined for refusing to work in contravention of the *Retail Business Holidays Act*. The employment standards officer does not hold a formal hearing before issuing an order, but is under a duty of fairness requiring him or her to disclose allegations and allow rebuttal. The Act requires compliance with orders issued under the Act and it is an offence punishable by a \$50,000 fine or imprisonment for not more than six months to contravene the Act. There is a duty of diligence imposed on directors, officers and agents of corporations, who are subject to the onus of proving that they did not authorize, permit or acquiesce in the contravention.

The Office of Adjudication holds hearings for three types of proceedings under the *Employment Standards Act*. "Adjudicators" decide appeals by employees from decisions of employment standards officers who have refused to issue an order to an employer, or who have issued an order that an employee believes does not include all the relevant entitlements. "Referees" hear appeals by employers from decisions of employment standards officers. Referees also hear references from the Director under section 69 of the Act when an employment standards officer reports that an employer may have failed to pay the wages owing or otherwise comply with the Act. Referees also deal with settlement of disputes about the right to refuse to work on Sunday.

The applications for appeals are sent first either to the Employment Standards Branch or to a Ministry of Labour office, which then forwards them to the Employment Standards Branch. The Branch then forwards the applications to the Office of Adjudication.

The appeals and references are oral hearings subject to the *Statutory Powers Procedure Act*. The Office is in the process of developing formal rules of procedure. The Office currently does not conduct prehearing conferences, but the adjudicator or referee may urge the parties to accept mediation. Mediation services are available through the Ministry of Labour. In general, the settlement rate is low. Where a remedy is available under a collective agreement, the Director has the discretion not to appoint an adjudicator.

In 1993, 770 cases were filed with the Office; in 1994, 618 cases were filed. The decrease in cases reflects the maturing of the system since the Office was only established in 1992. As

¹⁰⁵ Figures derived from Ontario LRC, above, note 103, at 30.

¹⁰⁶ Consent or a warrant must be obtained to enter a dwelling: s. 63(2).

decisions are issued, a consistency has developed that allows the employment standards officers to rely on existing interpretations in making orders.

The process within the Office of Adjudication generally takes six to nine months, but there is a wide variance in the time it takes for an application to be forwarded to the Office by the Ministry of Labour. It takes about thirty days for the Office to process a file after it has been submitted by the Employment Standards Branch; the hearing date is usually scheduled for about five months after the file has been received. The average hearing takes one to two days, but complex hearings may last as long as twenty-five days. Referees are statutorily required to release their reasons within ninety days of the hearing. Written reasons are generally released one to three months after the hearing. Copies are sent to the parties and are available on Quicklaw and in the Ministry of Labour's library. There is no appeal from the decisions of adjudicators or referees; the decisions are "final and binding."

Hearings may be held in English or in French and interpreters will be provided upon request. The hearing rooms are wheelchair accessible.

Issues raised by the Office of Adjudication:

- The Office relies on the Ministry of Labour to bring files forward; it has very little control over potential delays, which can occasionally be significant. Given that this is a Ministry agency, is this necessary?
- The Ministry mediates between the parties before the dispute reaches the Office of Adjudication. The Office is also exploring mediation. What is the relationship of the two processes and could they be better integrated?
- What are the opportunities for generic proceedings and rule-making in the health and safety area?

(f) THE ONTARIO HUMAN RIGHTS COMMISSION AND THE BOARD OF INQUIRY

(i) The Ontario Human Rights Commission

The Ontario Human Rights Commission (OHRC) is established by the Ontario *Human Rights Code*.¹⁰⁷ The Code creates rights to equal treatment without discrimination with respect to employment; accommodation; membership in trade unions, occupational associations or self-governing professions; the making of contracts; and the provisions of goods, services and facilities. In each of these areas the Code establishes prohibited grounds of discrimination. Prohibited grounds of discrimination are race, ancestry, place of origin, colour, ethnic origin, sex, sexual orientation, citizenship, creed, age, marital status, family status, and handicap. In the case of employment, "record of offences" is an additional ground. In the case of accommodation, "the receipt of public assistance" is also a prohibited ground.

Approximately three-quarters of the complaints received by the Commission are related to employment. Discrimination in services and housing are the next most common sources of complaints. The most common grounds for discrimination are handicaps (twenty-five percent in 1993/94); race or colour (twenty-one percent); sex and pregnancy (seventeen percent); sexual harassment (eleven percent); and age (nine percent).

The OHRC has a number of roles. Section 29 of the Code sets out the functions of the Commission. These include promoting understanding and compliance with the Code; developing and conducting education programs; carrying out research designed to eliminate

¹⁰⁷ R.S.O. 1990, c. H.19, as amended.

discriminatory practices; examining any statutes, regulations or programs and making recommendations on any matters that are inconsistent with the Code; inquiring into incidents or conditions leading to tension or conflict based on identification by a prohibited ground; initiating investigations into problems that may arise in the community based on identification by a prohibited ground of discrimination; encouraging and coordinating programs and activities to reduce or prevent such problems; assisting and encouraging public, municipal or private organizations to engage in programs to alleviate tensions and conflicts, and enforcing the Code and ordering boards of inquiry.

This list of Commission functions indicate the emphasis that is placed on education and the development of programs that will prevent or reduce the incidence of discrimination. The Commission, however, is also involved in the enforcement of the Code. The OHRC's enforcement role is primarily triggered by a complaint. Any person who believes that he or she has been subject to discrimination on a ground prohibited by the Code may file a complaint. In some circumstances, such as when a complainant fears reprisals, the Commission may initiate a complaint itself or on the request of any person. This provision also allows the Commission to initiate an investigation into systemic discrimination. The initial stages of the investigation will then be undertaken without a named complainant. The Commission has the discretion to refuse to deal with a complaint when, for example, the complaint appears frivolous or should be more appropriately dealt with under another statute.¹⁰⁸

The Commission investigates and attempts to settle complaints. It has an obligation under the Code to attempt to effect a settlement. It does not adjudicate on complaints, but where warranted, it refers a complaint to the Board of Inquiry to hold a hearing on the matter. The Commission is a party to the hearing and is responsible for the carriage of the complaint.¹⁰⁹ Relatively few complaints (e.g., less than four percent) proceed to the Board of Inquiry, leaving the Commission's investigation and mediation process to play a major role in the settlement of discrimination complaints. The adjudicative process of the Board will be discussed below.

In dealing with complaints, therefore, the OHRC's primary initial role is to investigate and seek a settlement. When an individual alleges that the Code has been violated, the case is assigned to an intake officer in one of the Commission's fifteen regional offices. The allegation becomes a formal "complaint" when the complainant signs a complaint form prepared by the intake officer. The caseload of allegations and complaints has remained fairly constant at about 2,400 in the last four years.

A number of files are settled informally through Early Settlement Initiatives ("ESIs") before the signing of the formal complaint and the initiation of a formal investigation. The intake officer will mediate or clarify the nature of the allegation, possibly through a fact-finding conference with the "parties." This may result in the withdrawal of the allegation or a settlement between the complainant and the respondent. Approximately half the allegations were settled by ESIs in 1992/93 and 1993/94. The proportion dropped in 1994/95 (865 settled by ESI from a total of 2,452).

¹⁰⁸ *Id.*, s. 34.

¹⁰⁹ The complainant may also be represented by counsel at the Board of Inquiry hearing.

The complaint is filed formally if the matter is not settled through ESI. A copy of the written complaint is sent to the respondent, who is entitled to reply in writing. After this exchange of documents, an investigative officer is appointed. The investigator conducts the investigation and makes a written report of findings, which is circulated to the complainant and respondent. One of the investigator's roles is to try to reach a settlement between the parties. Settlements that involve future actions by the respondent require the Commission's approval. There are twelve Commissioners and they or a division of three Commissioners meet regularly to consider these files. A settlement involving a compensatory payment of money does not generally require Commission approval.

Investigations may be undertaken by members of the Commission or by employees authorized by the Commission. The Code empowers the investigators to enter premises that are not dwellings and to require the production of documents and things.¹¹⁰ A typical investigation involves interviews, and may include extensive collection of documents and even statistical or other data analysis. An investigation of systemic discrimination may involve a full year or more of an investigator's time.¹¹¹ The investigation by an OHRC officer is not governed by the *Statutory Powers Procedure Act*.¹¹²

The OHRC has been subject to public criticism because of its delay in processing files and completing investigations. Because of the nature of the jurisdiction, delays can cause severe distress and, for some, the remedy may be too late. An individual dying of AIDS is not helped by an investigator's finding of discrimination in accommodation if death occurs first. The Commission has therefore been putting a high priority on decreasing its backlog. In 1990, it initiated its Case Management Plan (CMP), which involved improving training for investigators, setting productivity standards and limiting their caseloads to a maximum of ten at any one time. It set up a task force to deal with 400 of the oldest cases. In 1991 the government allocated \$10 million to the Commission to deal with the backlog and the task force was expanded. It was given a one-year mandate to deal with formal complaints that were more than six months old and not under investigation. The Human Rights Commission is also part of the model integrated case management program being developed under the aegis of the Management Board Agency Reform Project.¹¹³

The Commission keeps statistics on aging of files. In 1994/95, the ESIs were resolved in an average of 160 days from the time when the complainant first contacted the Commission. Of the 1,240 files formally closed in 1994/95, 174 were more than three years old; 308 were two to three years old; and 403 were between one and two years old. Fewer than thirty percent of the files were closed within twelve months. In 1994-95, the average time between the signing of a formal complaint and the closure of the file was 681 days; the median period was 624 days.

¹¹⁰ The consent of the occupier or a search warrant is required before a dwelling can be entered. These powers are similar to those found in the enabling acts of other regulatory agency with investigative functions, see, for example, the *Ontario Telephone Act*, the *Ontario Municipal Board Act*, and the *Employment Standards Act*.

¹¹¹ The investigation may take longer than a year since an investigator usually has a caseload of several files.

¹¹² Investigators do have a duty of fairness; Richard Ellis et al., "Human Rights Investigators and the Duty of Fairness," *Administrative Agency Practice*, Vol. 1-2, May, 1995.

¹¹³ See above.

The Commission decides to request the appointment of a Board of Inquiry in relatively few cases. In 1991/92, fewer than four percent of the cases closed by the Commission were referred to a Board; in 1992/93, fifteen percent; in 1993/4, nine percent, and in the last fiscal year, fewer than four percent were referred.

To get a picture of how the Commission disposes of cases—both allegations and formal complaints—within a particular year, 2,105 files were closed in 1994-95. Forty-one percent were closed as a result of ESIs. Of the 1,240 formal complaint files that were closed, fourteen percent were settled, fourteen percent were withdrawn, four percent were abandoned by the complainant, eight percent were dismissed by the Commission, sixteen percent were not dealt with by the Commission pursuant to section 34 of the Act (e.g., trivial, could be better dealt with under another Act,¹¹⁴ or not within the Commission's jurisdiction). Of the total 2,105 files, only forty-seven were closed by referral to the Board of Inquiry.

The Commission has a head office in Toronto and fifteen regional offices, including three regional offices in the Metropolitan area. Staff at regional offices receive and investigate complaints. The Commission provides services in whatever language is required. Because the OHRC does not adjudicate, it does not provide reasons for decisions as such. It does, however, inform a complainant in writing and provide a rationale when it decides pursuant to section 34 not to deal with a complaint and provides information on the procedure to request a reconsideration.

Settlements may be publicized without the names of the parties or other identifying information being disclosed. When the Commission determines not to refer a matter to the Board of Inquiry, it advises the complainant and respondent in writing and provides information to the complainant about the procedure for reconsideration.

The decisions of the Commission with respect to reconsideration are final. The *Human Rights Code* does not remove any civil causes of action that an individual may have, although an individual would generally be responsible for the expense of the carriage of a civil action.

Several issues are raised by an examination of the Human Rights Commission:

- There has been a great deal of concern expressed about delays: The case management process does not appear to involve any "triage" at the earlier stages to distinguish among cases of varying seriousness: all discrimination appears to be treated equally. There is a possible lack of focus on systemic discrimination.
- The high rates of settlement raise questions of the exercise of discretion by staff in determining the terms and conditions of settlement.
- There are possible conflicts between the role of the Commission official as investigator and as mediator, in addition to the conflict that may occur later when the Commission is responsible for the "prosecution" of the case before the Board of Inquiry. Should the mediation function be institutionalized separately within the Commission in the manner of the Insurance Commission mediation? Should parties have an opportunity to move to a more formalized mediation more quickly after the initial investigation has established that the complaint is not trivial, frivolous, etc.?

¹¹⁴ The other Acts generally invoked in section 34 are the *Labour Relations Act*, the *Pay Equity Act*, and the *Employment Standards Act*. See, OLRC, above note 103, for discussion of the potential for multiple proceedings in workplace disputes.

- Is a process where only four percent (or fewer) of formal complaints are actually referred to adjudication by a Board of Inquiry and only a quarter of those are subject to a decision, with reasons, by the Board an effective and efficient process?
- The relationship of the mandate of the Commission to the mandates of other tribunals, such as the Labour Relations Board or the Pay Equity Tribunal is unclear; there is a possible overlap or complementarity of function and mandate.

(ii) The Board of Inquiry

The Board of Inquiry has recently been institutionalized into a standing tribunal, replacing *ad hoc* boards that were constituted by the Minister at the request of the Commission. The Commission has the discretion to refer a matter to the Board, which must then hold a hearing. The Chair of the Board of Inquiry appoints the members of the panel who hold the hearings. There is a roster of thirty-five part-time members around the province who hold hearings in their own regions.

The Board of Inquiry is also part of a project aimed at the rationalization of the resources used by tribunals requiring similar skills or dealing in related subject areas.¹¹⁵ Six part-time vice chairs of the Board are cross-appointed to the Pay Equity Tribunal and the Employment Equity Tribunal. The appointments were made after public advertisements sought individuals who were qualified to serve on the three tribunals.

The mandate of the Board is to determine whether the right of a complainant under the *Human Rights Code* has been infringed and if so, by whom. It has a wide authority to make remedial and other orders and may order the respondent to “do anything” to achieve compliance with the Code. The Board may direct the respondent to make restitution, including monetary payment, for losses caused by the infringement of rights. It may also direct that the compensation include an award of up to \$10,000 for mental anguish where the infringement has been willful or reckless.

The Commission is a party to the proceeding before the Board and is responsible for the carriage of the complaint. Other parties include the complainant, who may be represented by counsel, and any person alleged by the Commission to have infringed a right of the complainant or any person who may appear to the Board to have infringed the right. The *Statutory Powers Procedure Act* applies to the hearings. Formal rules of procedure and a case management system are being put in place. The Board plans to make use of the new provisions of the *Statutory Powers Procedure Act* providing for prehearing conferences, mediation, and disclosure to narrow issues and streamline the process. On occasion, the Board has joined a number of claims into a single proceeding.

Most of the data on caseload and case management were collected prior to the amendments creating a standing Board. In 1994/95, however, the time from the referral of a case to the final decision of the Board took an average of one year. The decision may be several years, however, from the initial filing of the complaint with the Human Rights Commission. The average hearing lasted ten to fifteen days. The Board is required by statute to make its finding and decision within thirty days after the conclusion of the hearing. Approximately seventy percent of the cases settled prior to or during the hearing, however. The Board approves settlements reached at this stage.

¹¹⁵ See “Co-location and Rationalization Initiatives,” above.

Hearings are held in the area in which most of the parties are located. Decisions are provided to selected libraries and will be available on Quicklaw in mid-1995. The Board has the power to award costs in favour of the respondent and paid by the Commission when it finds that the complaint was frivolous or made in bad faith. Decisions of the Board may be appealed on matters of fact, law or both to the Divisional Court. Decisions of the Board do not provide binding precedents for the Commission or its investigators.

Several issues are raised by the Board of Inquiry:

- The implications of caselaw being established by a tribunal of part-time members dealing with only a very small percentage of complaints made to the Commission should be examined; there are no institutional processes or guidelines to ensure that the Board deals with the most serious or precedent-setting cases; there may be problems of consistency when cases are rarely adjudicated and an overwhelming proportion of cases are settled.
- The implications of the Management Board Agency co-location and rationalization project require examination; are efficiencies being obtained?
- Is there adequate coordination of policy/education function of Commission and precedential implications of Board decisions?
- In light of the delays getting cases to the Board, could the Board serve other functions, including dealing with interim orders (akin to injunctions) pending either additional investigation or opportunities for further settlement negotiations?

3. THE RELATIONSHIP OF THE ADMINISTRATIVE JUSTICE SYSTEM WITH OTHER INSTITUTIONS

(a) ADMINISTRATIVE JUSTICE SYSTEM AGENCIES AND THE GOVERNMENT

The administrative justice system agencies are creatures of the legislature, created by legislation and bound by the limits of their enabling statutes. Unlike the courts, the agencies have no inherent jurisdiction; the possible exception to this is that they may have a narrow inherent jurisdiction relating to what is necessary to perform their mandated function (e.g., maintain control over their process, subject to natural justice and fairness).

The agencies do not fit well within the traditional structure of parliamentary government. J.E. Hodgett's called them "structural heretics," which is kind in comparison to another reference to them as "camp followers."¹¹⁶ The administrative justice systems agencies are associated with departments or ministries (usually those with related policy responsibilities), but are not part of the department's internal organizational structure. The budgets of the administrative justice system agencies are usually found within the associated ministry's budget for the purposes of the Estimates and the minister is responsible for defending the agency's allocation. Thus an agency is vulnerable to the shifting financial priorities of the ministry and to bearing cuts to the ministry's budget.

The minister, however, is not responsible for the actions of an administrative justice system agency in the same sense that he or she is responsible for the actions of the ministry and its

¹¹⁶ J.E. Hodgetts, *The Canadian Public Service: A Physiology of Government 1967-70* (Toronto and Buffalo: University of Toronto Press, 1973), ch. 7; the other reference is found in the Glassco Commission Report, above note 23, at 56, quoting a British constitutional expert.

officials. In most cases, the minister cannot determine or direct agency decisions.¹¹⁷ There is some information about agency files, for example, that the agency could and should withhold from a minister. A minister is entitled not to be surprised in the Legislature by an agency action, but prior ministerial approval or authority is required only rarely for an administrative justice system agency acting in its adjudicative capacity.¹¹⁸ In some cases, a minister or Cabinet may deal with an appeal or review of an agency's decision and, in other cases, the agency does not make decisions but rather makes recommendations that must be confirmed by a minister or by Cabinet.¹¹⁹

Agencies maintain their relationship with their creators, the Legislature, through a responsible minister. The administrative justice system agencies, with a few important exceptions,¹²⁰ report to the Legislative Assembly through a minister, who is responsible (in the parliamentary sense) for the agency. The minister takes and responds to questions regarding the agency and, for the Schedule I regulatory agencies, presents their budgets to the Legislature through the Estimates process. Ministers, or the Cabinet, may also have particular powers in dealing with a particular agencies. For example, there are ministerial appeals and reviews by Cabinet of agency decisions. These have been subject to criticisms,¹²¹ and must be considered when the number of levels of appeals and the accountability of agencies are considered.

The deputy minister of the related ministry is responsible for the civil servants working in the agency. Most agency staff are public servants and the order-in-council appointees cannot supervise public servants.¹²² This raises questions about the responsibilities of the chair of the agency and the degree to which he or she can influence and be held responsible for staff actions. Additional ambiguities exist when the order-in-council appointee making adjudicative decisions is also a civil servant under the control of the deputy minister. The agency public

¹¹⁷ There are exceptions, such as where the Minister or Cabinet has a directive power that either sets out policy for the agency to follow or directs it to perform an authorized act. Such powers can be found in the federal *Broadcasting Act*, S.C. 1991, c. 11, and the Ontario *Telephone Act*, R.S.O. 1990, c. T.4. Ministerial or Cabinet review/appeal provisions in some statutes also allow for the political and bureaucratic determination of a matter within an agency's mandate.

¹¹⁸ Ministerial action may be the trigger or condition precedent for agency action; for example, certain disciplinary decisions related to trucking licensing were dealt with by the Ontario Highway Transport Board on a reference from the Minister of Transportation. Environmental assessments may be referred to the Environmental Assessment Board by the Ministry of Environment and Energy.

¹¹⁹ For example, Ministers may review certain decisions made by the Ontario Municipal Board or the Environmental Assessment Board, and the Lieutenant Governor in Council (Cabinet) may review decisions made by the Ontario Highway Transport Board or the Ontario Telephone Service Commission. Matters heard by the Ontario Energy Board relating to Ontario Hydro essentially result in recommendations and reports being presented to Cabinet or a Minister rather than decisions by the Board.

¹²⁰ To maintain their independence, the Ombudsman, the Information and Privacy Commissioner, and the Elections Commission report directly to the Legislature.

¹²¹ For example, H. Janisch, "Policy Making in Regulation: Towards a New Definition of the Status of Independent Regulatory Agencies in Canada," 17 *Osgoode Hall L.J.* 46; Priest, above note 36.

¹²² The *Public Service Act*, R.S.O. c. P.47, Reg. 977, limits the supervision of civil servants to other civil servants. A few Schedule I agencies, notably WCAT, do not employ civil servants, but rather their employees are crown employees of the agency itself and the Chair is clearly the CEO. The staff of Schedule III agencies, such as the WCB, are also crown employees.

servants are subject to the same protections and limitations as those working in ministries and the hiring, promotion and disciplinary procedures are the same.

The Memorandum of Understanding between the chair and the minister, which often includes the deputy, is intended to clarify their various relationships. In practice, however, the relationships and the assignment of responsibilities may depend on the personalities involved, although the Management Board Directives and Guidelines establish a broad list of responsibilities for each party. The role of the chair is a combination of custom and, like the inherent jurisdiction of tribunals, relates to what is necessary to carry out the functions. But the exact responsibilities, particularly in relation to the agency's members and staff, are largely undefined. As in many relationships, the lack of definition of responsibilities, rights, and obligations can be positive. Ambiguity permits flexibility and creative and humane responses when the system is working well. When the relationships break down, however,¹²³ the costs—in the reputation of individuals and the system itself, and in the effectiveness of both the agency and the system—are high.

The lack of classic departmental relationship with ministers and the Legislature has been a common source of discussion about accountability and the role and place of the administrative justice system agencies in government.¹²⁴ The relative lack of control by ministers over the decisions of agencies appears, to some, to mean that the agencies lack accountability to the legislature and to the public for their actions. Hence, a number of the studies and proposals for reform discussed above focus on the power of the government to control agencies through directives or political reviews of decisions and on the involvement of the Legislature in the appointment process.

These studies and governments have given less attention to the other ambiguities dealing with the role of chairs, the powers of the agencies, and their practical needs as independent adjudicators. Thus, recent legislation has included directive powers and Cabinet or ministerial review powers to ensure that agencies remain accountable to government but has not defined the powers of chairs as the chief executive officers of the agencies.¹²⁵ Nor has Parliament or the Legislature provided the chairs with clear disciplinary powers over members or set out routes and procedures to deal with discipline and complaints. There are no government-established criteria for performance assessment of agency appointees and no mechanisms to enforce memoranda of understanding or other agency-ministry relationships.

¹²³ In the past year, the examples that come to mind involve the Ontario Board of Parole and the federal Immigration and Refugee Board where the duties of chairs or vice-chairs, the disciplinary power of chairs, the relationship of chairs or vice-chairs and members, and the appropriate role of chairs and vice-chairs were all placed in question. More recently, see, "Labour board 'paralyzed' by deep rift," *Globe & Mail*, Sept. 5, 1995, B1. The examples also raise questions about the best method for government to investigate complaints and discipline or terminate the mandates of offending appointees.

¹²⁴ See, for example, discussions in the *Glassco Report*, above note 23, the *Lambert Report*, above note 24, and the *Ratushny Report*, above note 32.

¹²⁵ See, for example, the federal *Broadcasting Act*, S.C. 1991, c. 11 and the federal *Telecommunications Act*, S.C. 1993, c. 38; compare, however Bill 101, the *Canada Transportation Act*, given First Reading June 20, 1995, s. 13: "The Chairperson is the chief executive officer...and has the supervision over and direction of the work of the members and its staff, including the apportionment of work among the members and the assignment to deal with any matter before the Agency." The provisions for directives and review by the Governor in Council of Agency decisions are continued in Bill 101, however.

(b) ADMINISTRATIVE JUSTICE SYSTEM AGENCIES AND THE OMBUDSMAN

The Ombudsman is entitled by law to review the actions of an administrative justice system agency.¹²⁶ This includes a review of not only process and procedures (e.g., delays, application forms, language or other access barriers), but also a review of the substantive merits of the decision. The Ombudsman may investigate irrespective of other enabling acts that state that any agency's decision is final and not appealable. An application may be made to the Divisional Court to determine whether the Ombudsman has jurisdiction to investigate a matter.

Generally, the Ombudsman will not consider substantive merit complaints until the agency process has been completed. This includes the use of internal agency review and appeal provisions.¹²⁷ The complainant is not required to seek judicial review or judicial appeal of the agency's decision before invoking the Ombudsman's jurisdiction; however, the time limit for an appeal must have passed.¹²⁸

The Ombudsman's office can actively investigate a complaint. The Ombudsman or her delegate may enter the premises of a government organization and may examine any officer, employee or member of a governmental organization under oath. The Ombudsman has the discretion to hold an oral hearing, but if "it appears to the Ombudsman that there are sufficient grounds...to make a report or recommendation that may adversely affect any governmental organization or person, the Ombudsman shall give...an opportunity to make representations."¹²⁹

In reviewing the complaint, the Ombudsman will consider criteria established under subsection 21(1) and (2) of the Act:

- (1) ...the decision...
 - (a) appears to have been contrary to law;
 - (b) was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with the rule of law or a provision of any Act or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory;
 - (c) was based wholly or partly on a mistake of law or fact; or
 - (d) was wrong.
- (2) [Or]...in the making of the decision or recommendation..., a discretionary power was exercised for an improper purpose or on irrelevant grounds.

These grounds are similar, of course, to those applied by a court in reviewing decisions of administrative justice system agencies or hearing appeals of their decisions.

The Ombudsman, unlike a court, cannot overturn an agency's decision or render it void. She can make a determination on the complaint, whether it is a matter of process or substance, and make a recommendation for action to the agency. The complainant must be sent a copy of the Ombudsman's report and recommendations. If the agency does not respond, the Ombudsman's recourse is to send a copy of the report to the Premier; the Ombudsman may make a report to the Legislative Assembly.

¹²⁶ *Ombudsman Act*, R.S.O. 1990, c. O.6, s. 14. *Re Ombudsman of Ontario and the Ontario Labour Relations Board* (1986) O.R. (2d) 225 (Ont. C.A.). The Act does not apply to judges or to the functions of any court: s. 13.

¹²⁷ *Id.*, s. 17(1).

¹²⁸ *Id.*, s. 14(4)(a).

¹²⁹ *Id.*, s. 18(3).

Pursuant to section 23 of the Act, no proceeding or decision of the Ombudsman is liable to be challenged, reviewed, quashed, or called into question in any court. The sole exception is the question of jurisdiction.

In the past, agencies were often faced with a dilemma when presented with a report from the Ombudsman. Even when the agency agreed that the Ombudsman's concerns were well-founded and agreed with the recommendation for reconsideration of a case, the adjudicator was often functus, that is, the jurisdiction was exhausted. Without explicit legislative authority to review or rehear the matter, the agency could not implement the Ombudsman's recommendation.¹³⁰ Only a few agencies had power to rehear and reconsider decisions before the recent amendments of the *Statutory Powers Procedure Act*. The amendments will permit the administrative justice system agencies to review and reconsider their decisions. Among other advantages, these provisions allow agencies to be more responsive to the concerns of the Ombudsman.¹³¹

(c) ADMINISTRATIVE JUSTICE SYSTEM AGENCIES AND THE COURTS

The superior courts of a province have a general supervisory jurisdiction over all inferior tribunals, including the agencies of the administrative justice system. Thus, in spite of the experience of some agencies (primarily labour-related tribunals) with privative clauses, the decisions of the agencies will be subject to judicial review. Even those agencies with privative clauses are not immune, but the courts have tended to be relatively deferential to them on review.

In Ontario, judicial review is governed by the *Judicial Review Procedure Act* (JRPA),¹³² which was enacted following the recommendations of the McRuer Commission¹³³ to codify the prerogative writs. Under the JRPA, only a single form of application needs to be made and the problem of choosing the appropriate remedy has been eliminated. In light of the number of forms of appeals available, the McRuer Commission rightly rejected the proposal that specific remedies should be provided in each enabling statute.¹³⁴

At the same time that the JRPA was introduced, the Divisional Court was formed. This was intended to be a specialized court that would bring administrative law expertise and experience to its decisions. As the McRuer Commission noted, "Such a system would lend

¹³⁰ In some cases, depending on the issue and the agency, it might be possible for the complainant to file a new application, thus triggering the agency's jurisdiction to hear the matter anew. In many cases this would not be practicable or possible. If the Ombudsman had found such serious errors that the original decision was void, one could argue that no decision had been made and the agency retained jurisdiction. This would be a rare case, however.

¹³¹ While a number of provincial Ombudsmen have the power to review the merits of an agency's decision, there is not widespread agreement that this is suitable or useful. See, Brief of the Council of Canadian Administrative Tribunals to the Québec National Assembly, Committee on Institutions, *Mandate, Orientation, Activities and Management of Ombudsmen*, January 30, 1991. The Québec Protecteur du citoyen does not have such a power; the CCAT brief opposed the granting of a power to examine the substantive merits of an agency's adjudicative decisions (cf., decisions on process or administration of the organization).

¹³² R.S.O. 1990, c. J.1.

¹³³ Above, note 14.

¹³⁴ Id. at 326.

itself to the development of special expertise in the administration of this branch of the law by the judges presiding in the Appellate Division. This development is quite impossible when applications made be made for review to any one of the twenty-five judges of the High Court of Justice of Ontario.”¹³⁵

A number of enabling acts of Ontario agencies also provide for appeals. Appeals are considered to be extraordinary remedies and must be found in legislation; there are no appeals at common law. The legislative provisions are varied, however, and were enacted over a number of years. Consequently, there are no particular principles or rationales to determine what appeal provisions will apply to a specific agency. In examining the agencies being studied in greater detail for this paper, a range of appeal provisions is found. At one extreme, the decisions of the Workers' Compensation Board or the Workers' Compensation Appeals Tribunal are protected by privative clauses; the decisions are final and there are no appeals to the courts. The decisions of adjudicators under the *Occupational Health and Safety Act* and the *Employment Standards Act*, both labour-related statutes, are also “final and binding.”

The Criminal Injuries Compensation Board, like the WCB and WCAT, makes decisions dealing with eligibility for compensation. Its decisions, however, may be appealed to the Divisional Court on questions of law. The Ontario Insurance Commission could also be viewed as a body that deals with compensation issues; there is, however, no appeal from the Director's decision relating to an appeal of an arbitration.

The decisions of the Social Assistance Review Board may be appealed to the Divisional Court on questions that are “not questions of fact alone.” The decision of the Ontario Human Rights Commission to refer a matter to the Board of Inquiry is final, yet the decisions of the Board of Inquiry may be appealed to the Divisional Court on matters of fact, law, or both fact and law.

There are no criteria relating to the importance of the issues, the dollar value at stake, the precedential nature of the decision, the experience of the adjudicators, the complexity of the issues, the social class of the clientele, or any other factors that can be easily identified as establishing the limits of a likely taxonomy of appeal provisions. The Ministry of the Attorney General, Policy Division, did a sampling of legislative provisions a few years ago.¹³⁶ Aside from the variation of appeal provisions, there is a variation in the statutory language even when the practical result would be the same. In some cases, there is an appeal as of right, e.g., Ontario Securities Commission; in other cases, leave to appeal must be obtained from the Court, e.g., the Ontario Energy Board. There do not appear to be any criteria, such as impact on the public interest or dollar values, determining whether leave must be obtained. The Macaulay Report also noted the variety of forms of appeals and recommended that there be no appeals *de novo* and that all appeals should be on only points of law with leave of the court.

The relationship between appeals and judicial reviews is often unclear, particularly since the applications are usually made in tandem. In theory, a judicial review should be stayed or the court should decline to exercise its discretionary jurisdiction while the appeal continues. An appeal is usually a broader examination and may even be a hearing *de novo*. Furthermore, the standard for judicial examination of an agency's decision in an appeal has traditionally been “correctness.” The agency must have made the correct decision, not only in terms of the

¹³⁵ Id. at 330. There are now 197 General Division judges.

¹³⁶ Allan Shipley, “Statutory Appeals from Regulatory Agencies,” Policy Branch, unpublished.

proper exercise of its jurisdiction, but also in terms of the facts and merits of the case.¹³⁷ In contrast, judicial deference to an agency's expertise in a review may allow an agency to provide an incorrect yet "reasonable" decision. As Prof. H.W.R. Wade suggested:

On appeal the question is "right or wrong". On review the question is "lawful or unlawful".... Sometimes any aspect of a lower court decision is open to appeal, but sometimes statute will allow only an appeal on a point of law, as opposed to a question of fact.... Judicial review is a fundamentally different operation. Instead of substituting its own decision for some other body, as happens when an appeal is allowed, the court on review is concerned only with the question whether the act or order under attack should be allowed to stand or not.¹³⁸

The role of the agency in an appeal or judicial review may be largely dependent on the views of the preparing counsel and the individual judges.¹³⁹ Many Ontario enabling statutes include in their appeal provisions a section authorizing the agency to be a party to an appeal of its decision.¹⁴⁰ The role of an agency is limited, however, and may be particularly constrained by a conservative interpretation of the Supreme Court decision in *Northwestern Utilities*, where Mr. Justice Estey noted:

Section 65 [of the Public Utilities Board Act] no doubt confers upon the Board the right to participate in appeals, but in the absence of a clear expression of intention on the part of the Legislature, this right is a limited one.... The Board has limited status before the Court, and may not be considered as a party, in the full sense of the term, to an appeal from its own decisions.¹⁴¹

It is difficult, therefore, for an agency to give the court the benefit of its expertise during a review or even an appeal when the agency has party status. The court on an appeal exercises its powers within the bounds of the original record¹⁴² and is reluctant to receive additional evidence or comment from an agency on matters within the agency's expertise. Thus a tribunal cannot provide the court with the policy context or outline the economic principles of costing, for example.¹⁴³ The rules that govern the procedures of appeals are similar to those of other civil appeals, and the rules dealing with judicial reviews are also essentially similar.

¹³⁷ In practice the courts may often give a high degree of deference on appeals to expert tribunals, particularly on questions of fact. See, for example, *Pezim v. British Columbia (Supt. of Brokers)*, [1994] 2 S.C.R. 557.

¹³⁸ H.W.R. Wade, *Administrative Law*, 5th ed. (Oxford: Oxford University Press, 1982) at 34-35.

¹³⁹ Indeed, when the agency is represented by the Crown Law, Civil, section of the Ministry of the Attorney General, the issue can arise as to who is the client and from whom does the lawyer seek his or her instructions. Chairs have found that counsel have not viewed the agency and the Chair as clients and operate contrary to the instructions of the Chair.

¹⁴⁰ For example, the *Telephone Act*, the *Ontario Energy Board Act*, the *Ontario Highway Transport Board Act*, the *Ontario Municipal Board Act*, and the *Securities Act* (the Minister is entitled to appear).

¹⁴¹ *Northwestern Utilities Ltd. v. Edmonton (City)*, [1979] 1 S.C.R. 684, 89 D.L.R. (3d) 161 at 178.

¹⁴² R. Dussault and L. Borgeat, *Administrative Law: A Treatise*, 2d ed. Vol. 4 (Toronto: Carswell, 1990) at 374-79.

¹⁴³ It is not sufficient to say that these matters should have been included in well-written reasons and form part of the record. An agency dealing with an industry on an on-going basis will rarely outline the basic principles of costing or rate regulation, for example, in routine orders; to expect this would add to delays and encourage boilerplate reasons without adding to the parties' comprehension of the reasons.

4. CHALLENGES FACING ONTARIO'S ADMINISTRATIVE JUSTICE SYSTEM

The overview of the environment in which the Ontario administrative justice system agencies operate and the survey of several selected agencies identify some of the challenges facing the system.

An initial challenge is the recognition of the collective of Ontario agencies as a comprehensive administrative justice system. They are a group of agencies with individual mandates. There is, however, a commonality of procedures that has been imposed by the *Statutory Powers Procedure Act* and the common law requirements of the rules of fairness and natural justice. As noted above, there are common elements to case management across a number of agencies. There are common data collection needs. The agencies and their members have common concerns relating to appointments, training, evaluations, codes of conduct, and discipline. As a group, the agencies provide a system in which persons interact with each other and with government according to an established form of procedures and with the expectation that they will be given an opportunity to present their views fairly before an enforceable decision is made affecting their rights or obligations.

In practice, however, recognition is still slow that the agencies comprise a system. In general, there is little interest on the part of government to view the agencies as a group rather than as parts of ministerial fiefdoms. Budgets, appointments, memoranda of understanding, and even legislative changes are handled without an overall vision. Agency reform has a low profile and a low priority on the government agenda. An example of the lack of commitment can be found in the degree of government support given to agency training. The general lack of support for training continues in spite of adequate training for order-in-council appointees being recommended by nearly all the reform studies, noted above, as a cornerstone to an improved administrative justice system. The Appointments Secretariat in the Premier's Office has not considered the funding of training for new appointees to be part of its responsibilities. The funds for the ATEC are provided by the agencies, whose budgets do not include any allocations for training.

The administrative justice community itself has taken responsibility for reform of many aspects of the system. Training, codes of conduct, and evaluation procedures are being implemented by the agencies. The agencies initiated the procedural reform of the *Statutory Powers Procedure Act*. Their actions are a form of "self-help" and, to the degree that they include the elaboration of professional standards, are a form of self-regulation. Unlike most self-regulation, however, the reforms initiated by the agency community have not been to avoid the imposition of standards by government, but rather than been taken in the absence of government commitment to reform. While the self-help actions of the agency community take place within a framework of court decisions and various recommendations for reform, they are not part of a general government approach to achieving excellence in the administrative justice system.

Ad hoc reforms have thus been achieved within the agency community, but there is an ultimate barrier of legislation. The agencies are created and constrained by legislation; many recommendations for reform will require a legislative underpinning. In addition to the legislative limits on "self-reform," there is a need to institutionalize the current actions, many of which are dependent upon the commitment of individual volunteers. Reliance on volunteer activities does not provide a sufficient base for long-term reform.

The additional challenge that will underlie all other concerns for these agencies is lack of money. Like government in general, the agencies are faced with budgetary constraints. All the

agencies, including those examined above, are operating with reduced resources. In general, they not only have fewer dollars and personnel with which to fulfill their mandates, but they are also facing increased caseloads or additional responsibilities imposed by new legislation.

This paper recognizes, in proposing reforms to the system, that it is neither realistic nor helpful to simply suggest that greater resources be allocated to the administrative justice system. In some cases, more money or personnel need to be allocated to certain functions, and initial investments in such areas as information technology may be required before longer term savings or efficiencies are possible. A focus on cost savings alone, however, is likely to mean that budgets are cut without giving the agencies the tools (such as rule-making or greater discretion to grant appeals) with which they can operate more effectively. The government priority should not be cost reduction as an end in itself, but rather it should be on improved service and efficiency. Just as the agencies together form a system, so an approach to reform should be comprehensive and not *ad hoc* or piecemeal.

5. FUNDAMENTAL REFORMS OF THE ONTARIO ADMINISTRATIVE JUSTICE SYSTEM

(a) TECHNIQUES FOR BETTER MANAGEMENT OF THE ADMINISTRATIVE JUSTICE SYSTEM

The administrative justice system agencies examined in this paper are not a representative sample of Ontario agencies. The major economic regulatory agencies and the licensing agencies have not been included; the emphasis has been on selected agencies that make determinations affecting individual rights. Even these selected agencies, however, have common problems that can be found throughout the system: increasing caseloads, delay, and limited resources. Several of them are subject to caseloads imposed by policy decisions outside their control or affected by the quality of decisions made by another organization, possibly in a ministry or municipality. They are exploring alternative ways of fulfilling their responsibilities and carrying out their business. Mediation or alternative dispute resolution is being actively examined and used by several agencies, including some of the agencies being studied. Other techniques, including policy statements and generic hearings, are used less frequently but have the potential of leading to a better quality of decision-making or, in some cases, of reducing backlog and delay. Rule-making is rarely practiced by agencies, but closer involvement of administrative justice system agencies in government rule-making may produce better rules and allow for faster or more effective decisions.

(i) Coordination of Decision-Makers

A number of the administrative justice system agencies hear appeals of decisions made either by a ministry official or by another administrative body. In some cases, there is a long series of appeals, with little incentive for accurate and fair decision-making by the initial decider. Greater emphasis needs to be placed on the quality of the first decision. This may mean greater resources being allocated to the selection and training of this decision-maker or changes in process to allow for better information or fairer procedures. In the United States, for example, the Social Security Administration is currently experimenting with various methods of decision in order to reduce the number of appeals, the delays and dissatisfactions

with the disability determination process.¹⁴⁴ The testing of various models includes predecision interviews to ensure adequate information when a negative decision is anticipated and special training for disability claims managers who work in teams with medical experts.

Putting greater emphasis on the adequacy of initial decisions also includes the ability to correct errors and the requirement to deal with the consequences of errors. While the multiple internal appeal model of the pre-October WCB is not recommended, neither is the procedure where a full oral hearing by SARB is the first opportunity to correct even simple errors. An internal review process, with personnel consequences for high (or low) error rates, is preferable. This would also permit some evaluation of the sources of errors; for example, is a regulation overly complex and difficult to apply (which may imply a need for plain language and training) or are case loads conducive to mathematical errors (which may imply that a more efficient system would put more resources into a certain stage of the process)? There does not appear to be any general attempt to collect data that would allow such questions to be answered.

While the independence of adjudicative decision-making should be recognized, there should also be a point at which policy-makers should recognize the connected nature of the decision-making system involving appeals. The collection and communication of information is vital. With the implementation of improved case management systems and information management systems, this should be possible. It should also be viewed as an important reason for improving those systems, beyond the immediate benefits of increasing efficiency and reducing delays.

There is the additional issue of the integration of policies of the initial decision-maker and the appeal body. Appeals and uncertainty are increased when the criteria for decision are divergent. Generally the decisions of an appeal tribunal should be authoritative, in the absence of a court decision on the matter (which binds both the tribunal and the bureaucratic decision-maker). In practice, this has often not been the case. One model for dealing with divergent policies is section 93 of the *Workers' Compensation Act*, which allows the WCB Board of Directors to review a WCAT decision and direct a change in policy. This has not been a success, however, apparently because of the reluctance of the WCB Board to either use the power or to direct its own decision-makers to follow WCAT interpretations.¹⁴⁵

(ii) Case Management and Data Collection

Improvement of case management is key to the reduction of delay and inconsistencies in decision-making. Several agencies have very sophisticated case management and data collection systems in place. Other agencies have light caseloads that can be managed with manual office management techniques. In between, however, are a number of agencies faced with increasing caseloads, more complex cases, reduced resources, and inadequate or outdated case management systems.

The data inquiries made by the Policy Division of the Ministry of the Attorney General in the course of the Civil Justice Review and a perusal of various annual reports indicate a wide variation in the type and quality of data collection done by the various administrative justice system agencies. Even those agencies that compile accurate and thorough data for internal

¹⁴⁴ *Federal Register*, Vol. 60, No. 78, 20 CFR, Parts 404 and 416, April 24, 1995.

¹⁴⁵ See, WCAT, Annual Report, 1992 and 1993, p. 11.

uses, such as case management, may not have information necessary for broader uses, such as comparative evaluations of the administrative justice system processes.

The preliminary work done by the Management Board Agency Reform Project indicates that the agency procedures can largely be dealt with by a generic computerized case management system. A priority should be given to the development and implementation of the system. Additional investments may be required, but these should be offset by increased productivity (or maintenance of existing productivity with reduced resources). For many agencies, the case management system should include the identification and tracking of cases that require more urgent attention since better case management may include "fast tracking" some cases. Similarly, the case management system should also be capable of enabling agencies to identify issues that may be suitable for generic proceedings or rule-making.

The system should also be developed with broader data collection needs in mind. Ultimately, the administrative justice system agencies or other evaluators should be able to learn more about the effectiveness or efficiency of alternate procedures. Such information is useful not only for the internal improvement of agencies, but also for the development of new legislation and law reform generally. Not only can agencies' priorities be re-evaluated, but also general social and political priorities.¹⁴⁶

(iii) Generic Hearings and Policy Hearings

Most of the adjudication in the administrative justice system is done on a case-by-case basis, examining the evidence relating to each individual file. This is the classic form of adjudication, making each decision on its own merits. In some circumstances, however, a broader approach is not only possible, but also may yield fairer and more effective results. Agencies can stand back and examine broader matters, including policies and interpretations that would affect future cases, in generic proceedings.

"Generic" proceedings affect more than one party and usually are aimed at producing orders that deal with an entire industry or with a specific issue that has broad application. Notices of proceeding are given to the affected parties with an indication of the scope of the proceedings. In some cases, the notice provides considerable background information and even sets forth a series of questions that the agency wants to see addressed in submissions.

Generic proceedings often have a large written component, with submissions, interrogatories, replies, etc. being done in writing according to the "directions on procedure" issued by the agency. An oral hearing may be held to allow parties to cross-examine expert witnesses or elaborate on evidence. Examples of such proceedings are the federal Canadian Radio-television and Telecommunications Commission proceedings on Interexchange Competition, Costing, or the "Framework" hearings. The Ontario Telephone Service Commission dealt generically with such matters as principles for privacy in telecommunications, and the terms and conditions for interconnection to competing long-distance carriers.

A generic proceeding could also be carried out along the lines of a commission of inquiry, with extensive oral hearings to allow interested parties or members of the general public to present their views on policies. The agencies are particularly well suited, in comparison to ministries, to conducting public proceedings that collect the evidence and views of large

¹⁴⁶ For this and a number of other useful comments, I would like to thank Prof. Ellen Baar, Faculty of Social Sciences, York University.

numbers of persons. Parliamentary committees may perform a similar function, but agencies also have the advantage of the collected expertise of members and staff and experience in the area. A generic proceeding of this type (as well as the more commonly seen economic policy type) may often be initiated by a request from the government or the Minister that the agency examine and report on an issue.

The advantages of generic hearings is that the agency can stand back and take a broad look at an issue. All the likely affected parties are able to present their views on the matter; they are less likely to find themselves being affected by a policy decision developed to meet the needs of one party but inappropriate for an entire industry. The cost of developing the approach is shared among the parties rather than being placed on the person who happens to make the first application or the application in which the agency decides it has to develop a broader approach.¹⁴⁷ A generic proceeding may be lengthy, but it may also be considerably more efficient than a series of cases on similar matters dealt with one-by-one over a period of time. A generic hearing of this nature will produce an order that will bind the parties involved.

In some circumstances, it may not be possible or appropriate for an agency to conduct a generic proceeding leading to a binding order. The agency may not wish to make a final order on a matter or it may not be possible to involve the all persons (or their representatives) who will be affected by the order in the proceeding. In these situations, policy proceedings may be appropriate. The Supreme Court of Canada in the *Capital Cities* case approved the use of policy statements, particularly those issued after a public proceeding.¹⁴⁸ Policy statements are statements of the agency's view of policy or its interpretive views; they are not binding on the agency or on the affected public. In fact, a binding policy would be beyond the powers of an agency unless it had been granted rule-making power, as discussed below.¹⁴⁹

Policy statements are frequently used by agencies that deal with particular industries, much like the generic proceedings. They are also useful for those agencies that must adjudicate on a case-by-case basis, but that seek a way to establish greater consistency or develop an approach to a common issue.¹⁵⁰ By indicating the view that the agency is likely to take of a particular matter or by outlining decision criteria, policy statements save time and resources by advising parties of the cases they must make and the type of evidence required. Evidence and arguments are likely to be better targeted and honed. Policy-making also requires a public procedure, and usually involves broad notice, identification of likely affected parties or representatives of those (e.g., antipoverty groups, unions, industry organizations).

To date, policy statements have generally been used by the economic regulatory agencies, but could be applied by a wider spectrum of agencies. Policy statements issued by agencies are

¹⁴⁷ In fact, generic hearings can be precipitated by a single application that raises an issue that the agency decides is better dealt with broadly; the application is then turned into a generic proceeding by an agency that has the power to add parties and begin proceedings on its own initiative; alternatively, a single application may be stayed until the generic proceeding is completed.

¹⁴⁸ *Re Capital Cities Communications and C.R.T.C.*, [1978] 2 S.C.R. 141, 81 D.L.R. (3d) 609.

¹⁴⁹ This was made abundantly clear in *Ainsley Financial Corporation et al. v. Ontario Securities Commission et al.*, (1993), 14 O.R. (3d) 280 (Gen. Div.); affirmed by C.A., (1994) 21 O.R. (3d) 104.

¹⁵⁰ For example, one might ask whether questions of coverage of social benefits to deal with medical equipment or bandages could have been first examined through a policy hearing rather than in a meeting of the agency in the Tremblay case; *Tremblay v. Québec (Commission des Affaires sociales)*, [1992] 1 S.C.R. 952, 90 D.L.R. (4th) 609.

not legally binding documents.¹⁵¹ The agency must always be willing to take into account particular facts or circumstances that would make the application of the policy unfair or inappropriate. Policy statements, however, do outline an adjudicative agency's thinking on a particular matter, raise the profile of the issue and, perhaps best of all, force the agency and likely affected parties to do some public thinking on the matter.

The *Capital Cities* case encouraged agencies to use a public consultation process before promulgating any policies. Public notices, organized methods for receiving input from potentially affected persons, circulation of draft policies, comment on the drafts by affected persons, and widespread publication and circulation of the resulting policies are hallmarks of an adequate process of policy development. The Ontario Securities Commission (OSC) has been granted specific rule-making powers by Bill 190, which also provides a structure for the formulating of nonbinding policies by the Commission.¹⁵² The OSC process focuses on "notice and comment" provisions of draft policies. In fact, the affected public should be involved much earlier in the process, while the issues and problems, as well as the solutions, are still being defined. The development of a "Regulatory Agenda" or other mechanisms to give advance notice of proposed action to the public when the policies are still in the gestation stage is advisable.

Agencies generally could benefit from the requirement imposed on the OSC to develop and consult on an annual Statement of Priorities. While to a large degree, agencies must react to applications put before them and can often do little to control their caseload, they can think in longer terms and set priorities; the priorities might relate to regulatory issues or to case management and administrative issues, but they should be articulated. The Statement of Priorities should be public and published in the agency's Annual Report.

Most agencies do not require legislative amendments to their enabling acts to make greater use of generic proceedings or policy proceedings. Legislation does have the advantage, however, of making explicit and endorsing powers that already exist. With or without legislation, what is required is a re-examination of the mandate and caseload in generic or policy terms to determine what, if any, issues are susceptible to generic proceedings, and the dedication of resources to these proceedings. Agencies that have only part-time members may find it easier, in the short run, to deal with individual cases that require only a few hours or days of a member's time. This must be recognized and accommodations made before some agencies can make full use of generic proceedings (and rule-making). Agencies that deal with a disadvantaged clientele may have to recognize that additional resources may be required for legal aid clinics or antipoverty and similar groups to respond to the demands of a generic proceeding.

(iv) Rule-Making

Rule-making power, that is the power to make legally binding rules (or regulations), is relatively rare in the Canadian administrative justice system, although it is an important component of the American system. Some federal agencies, such as the Canada Labour Relations Board, have regulation-making power. The Canadian Radio-television and

¹⁵¹ Above, note 149.

¹⁵² Bill 190, *An Act to Amend the Securities Act*, S.O. 1994, c. 33, was passed on December 6, 1994 and proclaimed in force as of January 1, 1995 and March 1, 1995. The rule-making powers are discussed below.

Telecommunications Commission (CRTC) has the power to pass regulations, which may be varied or refused after-the-fact by the Governor-in-Council; the National Transportation Agency's (NTA) regulations must be approved before enactment. The CRTC and NTA regulations must be published in the *Canada Gazette* at least sixty days before being promulgated. While publication is intended to allow the public or interested persons an opportunity to comment on the draft regulations, it is too late for meaningful consultation when the regulation is drafted and promulgation is imminent. Consultation should begin earlier, at the "problem identification" stage. Federal agencies, however, do publish "regulatory plans," which provide some additional notice of intention to act in certain areas.

Historically, several Ontario agencies, including the Ontario Railway and Municipal Board and the Ontario Securities Commission, had substantive rule-making powers; these were removed from the legislation after the Second World War. Several agencies, including WCAT, continue to have procedural rule-making powers. There were no procedures associated with the exercise of these early powers akin to the "notice and comment" procedures found in section 553 of the American *Administrative Procedure Act*¹⁵³ or in the federal legislation governing the rule-making of the CRTC and the NTA.

The Ontario Securities Commission has recently been granted rule-making powers by Bill 190, the *Securities Amendment Act*. The areas in which it can make rules are broad, but not unlimited; they are specifically defined by the statute. The procedures mandated by the Bill are the result of an intensive study by a group headed by Professor Ronald Daniels.¹⁵⁴ The amendments provide for a notice and comment procedure: the Commission must publish a draft rule in the *OSC Bulletin* (a weekly publication) and give the public an opportunity to make written representations.¹⁵⁵ In practice, there would also be widespread consultation at the earlier stages while the draft is being developed. The Commission is also required to publish an annual Statement of Priorities after consultation with industry, and the rule-making (and policy-making) would likely be reflected in the annual Statement.

To ensure that ministerial responsibility is maintained, the OSC procedure requires that the draft rule be submitted to the Minister of Finance for his or her consideration. The Minister may approve, reject or send the rule back to the Commission with comments and instructions for further consideration. The Minister may not vary the rule. If the Minister does not respond, the rule goes into effect; i.e., there is no "pocket veto."¹⁵⁶ The final rule must be published in the *OSC Bulletin* and the *Ontario Gazette*. An OSC rule does not have the full force of a regulation in the sense that the government retains the power to make regulations in the same subject areas as the Commission can make rules, and the government regulations take precedence over any Commission-issued rule. The procedures in the *Securities Act*, however,

¹⁵³ U.S.C. §§ 551-59, 701-06, 1305, 3105; 334, 5372, 7521. CRTC regulations must be published in the *Canada Gazette* at least sixty days prior to coming into effect; presumably comments are invited, although this is late in the process for significant changes to be made. The proposed Regulations Act, Bill C-84, First Reading, April 26, 1995, does not contain any mandatory notice and comment provisions.

¹⁵⁴ Ontario Task Force on Securities Regulation, *Responsibility and Responsiveness, Final Report* (Daniels Report), June, 1994.

¹⁵⁵ The Commission could call a hearing to take representations orally, but the process is envisioned as generally being a paper process.

¹⁵⁶ The Securities Commissions of Alberta and British Columbia have also recently been given rule-making power; neither is required to seek preapproval from the responsible Minister.

can be viewed as an acceptable model of notice and comment provisions for the Ontario administrative justice system.¹⁵⁷

The benefits of rule-making for Ontario agencies are several.¹⁵⁸ Rule-making, accompanied by a procedure similar to that described above, is a public and accountable action, drawing on the expertise of industry, government, labour, and other affected parties. It can allow for better integration of broader policy with the workings and responsibilities of the agencies.¹⁵⁹ It allows those on the "front line" to develop the rules governing their activities. In a sense, it allows for policy statements that have the force of law; in many cases, the appropriate subject matters for individual agency rule-making are the same as those on which it might develop policies after public proceedings. In some cases, policy statements might even precede a rule, allowing for experimentation and a closer examination of the situations in which exceptions to the policy are required. The OSC experience will provide a useful model, but broader provision of rule-making powers to the administrative justice community can be a useful tool in providing effective and efficient service to citizens.

(v) Alternative Dispute Resolution

The administrative justice system has been receptive to alternative dispute resolution, particularly mediation, in recent years. Mediation processes are built into the mandate of some agencies; indeed, for some such as the Insurance Commission, it is a primary mandate. Others, such as the Liquor Licence Board and the Ontario Municipal Board, have adopted techniques in an effort to reduce hearings or the length of hearings.

The new amendments to the *Statutory Powers Procedure Act* allow for mediation at a prehearing conference. The Management Board ADR Consultancy and the training sponsored by SOAR-ATEC provide opportunities for agencies to develop expertise and experiment with ADR. It is possible that ADR will reduce the costs of settling disputes and move cases more quickly through the system. It may also increase the satisfaction of the parties with the final decision.

It cannot be assumed, however, that ADR is a magic cure for the ailments of the administrative justice system. ADR itself has weaknesses. There may be problems with the relative power and willingness of opposing parties to participate. Extensive use of ADR may remove the element of "open justice" and accountability from the system, with a number of decisions being made following private negotiations. Even when the decisions and agreements of negotiated settlements are public, there is no record of the proceedings to assess their fairness and compliance with the mandate of the agency. The mere fact of agreed settlement does not necessarily imply satisfaction and fairness; it may indicate only that there is a settlement to which a less powerful party believes he or she must agree. Consistency, which is

¹⁵⁷ While the procedures are more elaborate than those found in other legislation (e.g., the federal *Telecommunications Act*), they have been subject to criticism; Philip Anisman, "Legitimizing Lawmaking by the Ontario Securities Commission: Comments on the Final Report of the Ontario Task Force on Securities Regulation" in *Securities Regulation: Issues and Perspectives* (Toronto: Carswell, 1994).

¹⁵⁸ For additional discussion, see, Hudson Janisch, "The Choice of Decision-making Method: Adjudication, Policies and Rulemaking" in Special Lectures of the Law Society of Upper Canada 1992, *Administrative Law: Principles, Practice and Pluralism* (Toronto: Carswell, 1993).

¹⁵⁹ For example, it might reduce the degree to which agencies find their processes and caseloads are subject to serious disruption by ministry policies or regulations about which the agency may not even have been consulted.

arguably an element of fairness, may be lost when a number of decisions are negotiated. Widespread use of ADR may also diminish the number of "benchmark" decisions against which parties can judge their own actions and satisfaction with negotiated outcomes.

A systematic evaluation must be made of the ADR efforts and criteria for when ADR should be used. For example, what cases (if any) should be screened out of a mediation process, even if the parties appear willing? How is the "public interest" component injected into a mediated settlement? Where the agency has an important public interest and industry oversight jurisdiction, are any special procedures required, such as wider publicity of the settlement and the evidence and basis for the settlement than might generally be associated with a negotiated solution? What can we really conclude about satisfaction with a mediated settlement, since it is not necessarily perceived as a "fair" settlement by the parties.¹⁶⁰ Is it possible to create a more even playing field between parties of unequal bargaining power?

A broader commitment by the government to the efforts of the agency community, including the Agency Reform Project and SOAR, to experimentation with ADR and to answering these questions is needed.

(b) FUNDAMENTAL CHANGES TO THE STRUCTURE OF THE ADMINISTRATIVE JUSTICE SYSTEM

Even a cursory review of the administrative justice system raises some fundamental questions relating to the underlying structure of the system. There is no rationale for the myriad provisions for appeals from agency decisions and the role of judicial review is often overshadowed when constituent legislation provides for appeals. Discipline and complaints are handled on an *ad hoc* basis. The political nature of the appointments to agencies undermines the reputation of the system and its members. Furthermore, while it may be a system in the broad sense, the agencies do have structures and mandates that reflect their individualized establishment and the political concerns of the day.

(i) The Role of the Divisional Court

Appeals from decisions of Ontario administrative justice system agencies are generally made to the Divisional Court. The provisions of the *Judicial Review Procedure Act* set out the process for judicial review of agency decisions by the Divisional Court. The Divisional Court was originally envisioned by Justice McRuer as a separate expert court where experience and expertise in the administrative justice system, and indeed in the administration¹⁶¹ as a whole, could be developed. The Divisional Court, however, has not truly fulfilled this vision. General Division judges are assigned from time to time to the Divisional Court, but the very size of the General Division of the Supreme Court of Ontario makes it increasingly less likely that individual judges will have the opportunity to develop the necessary expertise. The issue of judicial expertise also raises questions about whether the judges themselves find assignments to administrative law cases to be less desirable. Furthermore, it would appear that experience in government or the administrative justice system is generally not given great weight when judicial appointments are being considered.

¹⁶⁰ See below, "What is a 'fair' hearing?"

¹⁶¹ I am using this term in the sense used by René Dussault and Louis Borgeat, *Administrative Law, A Treatise*, 2d ed. Vol. I, *The Role of Law in the Administration* (Toronto: Carswell, 1988).

While the Divisional Court exists as a separate court for matters dealing with government administration, including appeals and reviews of agency actions, it essentially uses the same procedures and approaches as in civil cases. Thus, an appeal is limited to the record established in the hearing by the lower tribunal. It is considered inappropriate for the lower tribunal (e.g., an administrative agency) to comment on or defend its position before the Court.

There are three major areas to be examined in dealing with the role of the courts in the administrative justice system. The first relates to appeals, the second to the scope and terms of judicial review, and the third to the nature of the court that is empowered to deal with reviews of administrative decisions and actions or appeals from decisions.

In terms of appeals, for example, the first question that should be asked is whether any or as many appeals should exist at all? If they are maintained, then the next question is, on what grounds should appeals be allowed? The third question is, what procedures should govern the appeals? These questions are inter-related and go back to the rationale for the establishment of administrative justice system agencies.

The principle that an appeal must exist for decisions that affect individual rights was stressed by the McRuer Commission.¹⁶² Many of today's provisions relating to appeals can be traced to the influence of the Commission. It can be argued, however, that more weight should be given to the reason for organizing an agency that is removed from the general stream of government decisions or civil litigation. Thus, if an agency has been organized specifically in order to allow nonlegal expertise to be applied to a decision and to build up a body of expertise that can be relied on by the decision-makers, then it is questionable whether an appeal should lie to a nonexpert body that was not considered to be appropriate to decide the matter in the first place. Furthermore, asking a nonexpert court to substitute its discretion for that of an expert tribunal based upon the same facts appears to be an unwarranted and inefficient duplication.

Where agency decisions have a large "public interest" component, one might also question whether a court is the best forum in which to explore or re-do the issues that involve an exercise of political and expert discretion. When an agency has been established to deal with a large caseload, especially a caseload that itself comprises appeals from lower decisions, the question arises whether additional appeals improve the effectiveness of a process intended to be quick, consistent, and relatively inexpensive. In asking all these questions, one must continue to keep in mind that judicial review is available to constrain the agencies in any unauthorized exercise of their powers.

All agencies subject to the *SPPA* now have the power to review and reconsider their decisions. The usual grounds for reconsideration include new evidence that was not previously available, changes in circumstances, and errors by the agency. In practice, the grounds for rehearing and reconsidering decisions are broader than those for appeals and the process is often less expensive and more expeditious than an appeal to the courts. The *SPPA* provisions strengthen the argument that appeal provisions should be used more sparingly in legislation, with greater reliance being placed on expert bodies to correct their own mistakes.¹⁶³ Related to

¹⁶² Above note 14, Chapt. 15.

¹⁶³ Even the McRuer Commission acknowledged that expert appeals might be best made to another panel of experts. *Id.* at 235. The question of whether appeals should exist is a separate matter from judicial review, discussed below.

the agency's capacity to deal with its own errors is the role of the Ombudsman in identifying and seeking correction for agency actions and decisions considered to be unfair or erroneous. The introduction of the Ombudsman into the administrative justice system arguably further diminishes the importance of the role that court appeals play in providing for the fair administration of justice.

If the political decision is made to continue to have provisions for appeals to the Divisional Court in the enabling statutes of administrative justice system agencies, then the appeals should be limited to questions of law, with leave only. Questions of law are the areas in which the court can argue it possesses expertise equal or superior to that of the agency. This is to be compared to the court's relative lack of expertise in, for example, telecommunications costing principles or capital market behaviour.

The procedures on appeals should be adjusted to recognize the differences between an appeal of a decision in a civil matter in a lower court and the appeal of a decision of an administrative justice system agency. While it may be unseemly for the agency to defend its decision as such, mechanisms and procedures must be developed for the agency to share its expertise and the context of the regulatory regime and legislative mandate in which the appealable matter arose. The least disruptive method would likely be to allow affidavits by the agency or other experts on these matters. The court is in a position to control its procedure and discipline agencies (e.g., through costs) that use this opportunity to "replead" their views rather than share expertise with the court.

Judicial review of administrative system agencies in Ontario is an integral part of the system of justice. Even where privative clauses exist, questions of jurisdiction may be examined. The degree of deference given by the courts to the actions of the agencies differs, depending on the existence of a privative clause or the degree of expertness required of the agency. Those with an acknowledged reputation as expert, such as the Ontario Securities Commission or the Information and Privacy Commissioner, will tend to be given a high degree of deference. There also tends to be more latitude given to agencies in providing the court with information about their mandate and the context of the decision. Nonetheless, agencies are still subject to procedural rules developed in a civil litigation context. These rules should be examined to allow the courts to take a more functional approach to deciding what evidence should be used to decide the issues in a judicial review.

Expanded roles of administrative justice system agencies in the development and promulgation of policies and rules may also have some implications for grounds of judicial review. It has been suggested that the Ontario Securities Commission be subject to review for proportionality in its exercise of its new rule-making powers.¹⁶⁴ A review for proportionality would allow the court to examine whether the rule, which is intended to achieve a particular regulatory objective, embodies excessive or arbitrary means of achieving that objective.¹⁶⁵

It should also be noted that another role exists for the courts in relation to the administrative justice system agencies. The courts are the interpreters of law in our society, and a number of

¹⁶⁴ Anisman, above note 157.

¹⁶⁵ It may be noted that proportionality of rules has been adopted as a basic principle of regulation by the Organisation of Economic Cooperation and Development in its *Guidelines for Regulation for OECD Countries*. See, Eric Milligan and Margot Priest, *The Design and Use of Regulatory Checklists in OECD Countries*, Public Management Occasional Papers, Regulatory Management and Reform Series No. 4, Organisation for Economic Co-operation and Development, Paris, 1993.

agencies have the legislative power to "state a case" to the Divisional Court for its opinion. In some circumstances, parties may state the case or request the Court to require the agency to state the case.¹⁶⁶ This mechanism allows the agency to rely on the expertise of the Court in the law, while providing the Court with the information it needs to deal with the expert context in which the law operates. Not all agencies, however, have the power to state a case. Unfortunately, the recent amendments to the *SPPA* did not include a general grant of this power to the agencies.

Any discussion of the role of the courts in the administrative justice system must address the need for expertise in the courts. The Divisional Court has not acquired the focussed experience envisioned by the McRuer Commission when it recommended the establishment of a specialized court. Judicial assignments should give even greater weight to the need to establish the experience and expertise. Expertise can be found on the Court, but it may be advisable to revisit McRuer and examine whether a specialized and separately structured Administrative Appeal Court should be established to deal with administrative justice system matters.

The Australian Administrative Appeals Tribunal (AAT) was established in 1975 to hear appeals from decisions made by Commonwealth Ministers, statutory bodies, officials, and some tribunals.¹⁶⁷ The president of the AAT is a judge of the Federal Court and the members include other judges, lawyers, doctors, social workers, and other experts. To some degree, the AAT functions as a specialized court; in another sense, it performs appeal functions that are analogous to those currently found in some specialized Ontario tribunals, such as the Social Assistance Review Board or the Workers' Compensation Appeals Tribunal.¹⁶⁸ The decisions of the AAT can be appealed to the Australian Federal Court on questions of law.

The provincial government is constrained in the establishment of an appeal tribunal by the provisions of section 96 of the Constitution Act, 1867.¹⁶⁹ The implications of a body within the administrative justice system that is not a court but that hears appeals from a number of lower decision-makers will be discussed below in "Rationalization of Administrative Justice System Agencies." The establishment of a specialized court with federally appointed judges that deals with appeals and reviews of decisions made by the Administration (in the broadest sense of the term), however, deserves closer examination. In any event, the Divisional Court, or its successor, should be structured both to permit expertise in the administration to develop and to provide a more sympathetic culture to the administrative justice system.

(ii) An Administrative Justice System Council

Many of the reform recommendations propose the establishment of an Administrative Council. Many of them quote H.W.R. Wade on the subject:

¹⁶⁶ See, for example, the *Ontario Highway Transport Board Act*, R.S.O. 1990, c. O.19, as amended.

¹⁶⁷ Terence G. Ison, *Australian Administrative Appeals Tribunal*, Law Reform Commission of Canada, Study Paper (Ottawa: Minister of Supply and Services, 1989); Administrative Appeals Tribunal, *Annual Report, 1991-92*.

¹⁶⁸ The AAT is a Commonwealth body, thus its mandate relates more closely to matters under the jurisdiction of a federal government, e.g., veterans' affairs, customs, civil aviation, and bankruptcy.

¹⁶⁹ *Re Residential Tenancies Act of Ontario* (1981), 69 D.L.R. (3d) 25 (S.C.C.); *Crevier v. A.G. Québec* (1981) 127 D.L.R. (3d) 1 (S.C.C.).

A body is needed to deal with complaints as they are, instead of leaving them to build up into a volume of public discontent which every twenty-five years or so, discharges itself in a special but temporary inquest by a committee which merely reports once and then dissolves.¹⁷⁰

The roles given to this organization by the reports vary, but they include appointments, maintenance of data banks of candidates, discipline, investigation of complaints, establishment of codes of conduct or conflict of interest guidelines, training, and advice on administrative justice system matters.

In Ontario, the Society of Ontario Adjudicators and Regulators (SOAR) has taken on some of these roles on a voluntary basis. It is drafting a Code of Conduct for members of tribunals and has organized training. It does not have the authority or mandate, however, to deal with matters of discipline, investigations of complaints, or recommendations on appointments. While it may provide an informal source of advice to the government on matters relating to the administrative justice system, SOAR has neither the resources nor the mandate to provide regular advice to the government.

The experience of SOAR indicates, however, the benefits of an organization where all the Ontario administrative justice system agencies can work together toward common goals. Experience has also indicated a need for an organization that can deal with other matters, particularly discipline and the investigation of complaints. Each year, governments across Canada deal on an *ad hoc* basis with problems that arise in the administrative justice system. There is no equivalent to a Judicial Council where the public can confidently expect problems to be dealt with by experienced and knowledgeable persons.¹⁷¹ There is no place where chairs or members can seek recourse in dealing with internal discipline or conflicts with the government. For example, there is no method of enforcing the Memoranda of Understanding that are negotiated among chairs, ministers and, sometimes, deputies. There is no body that can impartially deal with performance appraisals of chairs or set the criteria for such appraisals. An Administrative Justice System Council could perform all of these functions. It would have the additional benefit of re-enforcing the coherent nature of the system and would raise its profile with the public and with government.

An additional important task for such a Council is policy and research responsibilities relating to the administrative justice system. The U.K. Council on Tribunals has focussed largely on the procedural rules of tribunals, but has also commented extensively on proposed legislation.¹⁷²

In this area, it may also be appropriate to draw on the model presented by the Administrative Conference of the United States, which has an ongoing responsibility to make recommendations relating to the health and efficacy of the administrative system as a whole.¹⁷³

¹⁷⁰ Wade, above note 138 at 795.

¹⁷¹ In Québec, Bill 105, which died on the order paper prior to the last election, would have established a Council that would have, among other things, the responsibility for dealing with discipline for a select number of tribunals. The Garant Report, above note 35, recommends that the provisions of Bill 105 be revived and apply to a larger number of tribunals.

¹⁷² For a comprehensive, although slightly dated, overview of the various councils, see, Alan Leadbeater, *Council on Administration*, Administrative Law Series, Law Reform Commission of Canada (Ottawa: Minister of Supply and Services, 1980)

¹⁷³ A description of the Administrative Conference states that its purpose is to "promote improvements in the efficiency, adequacy, and fairness of procedures by which government agencies conduct regulatory programs,

The Australian Administrative Review Council is another model. Its role is to provide "specialist policy advice to the Minister of Justice on strategic and operational issues affecting Commonwealth administrative decision-making processes, particularly processes for the review of government decisions."¹⁷⁴

If the emphasis were to be only policy and research, the Ontario Law Reform Commission, with adequate resources, could be given an ongoing mandate in this area. The importance and profile of administrative justice research might be lost, however, if it were simply a portion of the OLRC's broader mandate.

Many of the policy and process concerns relate to particular administrations and statutes, but some issues transcend provincial borders. There may be opportunities for joint federal-provincial action in this area, although the experience of the Uniform Law Conference and the commitment of other jurisdictions to law reform organizations may not provide grounds for optimism in this matter.

(iii) Appointments

The issue of appointments to the administrative justice system agencies is at the heart of any reform to the system, including the reform of its reputation. Appointments have been identified as critical to the success of the system by all or most of the studies of administrative justice in the past thirty years. The recommendations have focused on reforms to the process of appointment to ensure that individuals appointed to the administrative justice system agencies are "competent." Proposals have included data banks of prospective nominees, public advertising of positions on agencies, job descriptions, and possibly some sort of vetting or interview procedure. Proposals have generally shied away from discussing the terms and conditions of appointment, except for some rationalization of the length of appointments.

The broad negative effects of the existing appointment process should not be underestimated. The process tars all members of the administrative justice system agencies with the brush of "political hacks," feeding at the government trough. The label applies to those who have no political background and clear credentials in the substantive area of adjudication. For those who have a political background, their other credentials and credibility are completely ignored; it is assumed that the only possible basis of appointment is clearly political. As a result, the general impression is that agency members have few or no credentials and do little work for their per diems or salary. It appears quite possible for the public, the bureaucracy and politicians to simultaneously hold the inconsistent notions of expert tribunals and pork barrel appointments in their heads. The phrase "patronage appointment" has become shorthand for incompetence.

Unfortunately, there is enough truth in the perception to make it difficult to convince ministry officials, lawyers, journalists, politicians, and client groups that the system is largely

administer grants and benefits, and perform related government functions....the Conference conducts research and issues reports concerning various aspects of the administrative process and, when warranted, makes recommendations to the President." *Federal Administrative Procedure Sourcebook: Statutes and Related Materials*, May, 1985, introduction. ACUS was disbanded at the end of 1995.

¹⁷⁴ Administrative Review Council, *Seventeenth Annual Report, 1992-93*, p. 1. The functions of the Council are found in section 51 of the *Administrative Appeals Tribunal Act 1975*.

composed of competent, hard-working people with integrity and dedication.¹⁷⁵ Indeed, it is the professionalism of this core group that allows the system to carry out its functions.

Removing the political element from the nomination and appointment process is a key factor in reform. The political element as it currently exists makes it impossible to improve the reputation of the administrative justice system. It limits the commitment of the government and the bureaucracy to the adequate funding of the system, including recruitment, training, and continuing professional education of the members. It limits the willingness to experiment with new approaches to decision making, including rule-making. It limits the willingness of the bureaucracy and the politicians to devote the time and resources necessary for legislative reform. In addition, it limits the willingness of government to develop the infrastructure that would allow for efficient administration of the system, including an Administrative Justice System Council, ongoing policy development and law reform, and a specialized expert court to deal with judicial review or appeals.

In examining the appointment process and the potential and implications for reform, it is important to remember that the administrative justice system appointments are only a fraction of the total appointments made by government. When assessing the political limitations on reform, it is only a part of the existing appointment process that need be examined. Administrative justice system appointments are a relatively small proportion of appointments made by a government, although they do include a number of the higher profile and higher paying positions. There are approximately 5,500 positions filled by government appointments: 1,300 of these are appointments made by Ministerial letter; 4,200 are order-in-council appointments made by the Lieutenant-Governor-in-Council. Of these 5,500 positions, only about 220 are full-time appointments to administrative justice system agencies.¹⁷⁶ There are no data for part-time appointments. There are several hundred part-time adjudicative appointments; a large number of these being to the Assessment Review Board and the Psychiatric Review Board. The rationalization of the agencies, discussed below, would result in a larger number of full-time appointments, fewer part-time members, and more efficient use of members through cross-appointments. In summary, the numbers of appointments for which the process requires changes to allow for fundamental administrative justice system reform is a manageable number. Once a new system is implemented, the number becomes even more manageable if competent appointees are permitted to serve longer than six years.

An obvious model for appointments is judicial appointments.¹⁷⁷ There is no single process as it varies from province to province (and from the federal process), but each involves nonpolitical persons in the process.¹⁷⁸ Ontario has a new Judicial Appointments Advisory Committee, comprised of a majority of nonlawyers. The Committee advertises a vacancy, reviews the applications, establishes the criteria for selection, interviews candidates and gives the Attorney General a ranked list of several candidates, with reasons for the ranking. The

¹⁷⁵ See, six-part series in the *Globe & Mail*, "Patronage: Friends in high places," February, 1995.

¹⁷⁶ Data from Appointments Secretariat, Office of the Premier.

¹⁷⁷ This is not intended to imply that the administrative justice system should be judicialized or become more "court-like." These are completely separate issues.

¹⁷⁸ For a review of various provincial procedures, see, Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, A Report Prepared for the Canadian Judicial Council (May, 1995), Chapt. 11, pp. 243-46.

Attorney General may appoint only a candidate from the list, although the list may be rejected and the Committee required to provide another list.¹⁷⁹

Another model is the civil service. Both these models make use of an independent body to recommend or make appointments. The Franks Committee in the United Kingdom recommended that a Council on Tribunals have the power to appoint members, with the appointment of chairs continuing to be left with the Lord Chancellor.¹⁸⁰ The potential for an Administrative Justice System Council to play a significant role in appointments is evident.

The appointments to administrative justice system agencies should be the responsibility of the Premier, not individual ministers, in recognition of the importance of the system and its appointments. Thus it is the Premier who should be provided with the "short list" of prospective candidates by the Council.

The appointments to the administrative justice system, unlike judicial appointments, are for a term. Here the appropriate model is the business world and employment contracts. The contracts would set out the consequences of dismissal, including severance compensation, would provide for notice provisions for reappointment, and would provide a termination package to provide a bridge to allow the agency member to seek other employment after termination.

In looking at the interrelationship of independence with terms and conditions of appointment, it should be noted that "independence" of a decision-maker does not require a lifelong income, however attractive that might be to the individual. What it does require is sufficient certainty to plan and sufficient resources to make the transition to a new position. The employment contract should include provisions for transition, taking into the consideration that it is inappropriate for administrative justice system agency members to actively seek employment during their terms of office.

The employment contract, like private sector contracts, should also provide for settlements in the case of dismissal without cause. The current appointment process is often defended on the grounds that the government needs to be able to appoint people with compatible philosophies to positions of authority. There is nothing wrong with this view, but it does not follow that only the existing process can provide for compatible appointments. Nor does it follow that requiring appointees to take legal action each time the government wants to dismiss them for philosophical reasons is either an effective use of public resources or enhances the reputation of the system. Corporations often change senior executives when different talents or points of view are required; employment contracts provide for the appropriate compensation packages on dismissal. Indeed, several individual Ontario appointees have negotiated similar contracts, recognizing the government's desire for compatible senior appointments. These contracts are also common in other provinces.

Furthermore, if appointments are not to be considered as payoffs for past political favours rendered, but as positions to be occupied by competent professional people, some consideration has to be given to the career development of appointees. The Ontario policy of "two terms and out" is not an efficient use of human resources and undermines the

¹⁷⁹ *Courts of Justice Statute Law Amendment Act, 1994*, S.O. 1994, c. 12, s. 43.

¹⁸⁰ The Council on Tribunals is discussed above, in "Administrative Justice System Council."

development of an effective system.¹⁸¹ It may be that if the reputation of the system is improved so that its members are presumed to be competent, those people will find that other positions are open to them. In the meantime, however, the government should give more thought to how it might use the talents of members who seek other career choices.

(iv) The Rationalization of Administrative Justice System Agencies

Most examinations of the administrative justice system in Ontario come to the conclusion that agencies have developed in an *ad hoc* manner, without set criteria for their form or establishment. While criteria for the establishment of agencies exist in Management Board Directives, they are either honoured in the breach or are justified according to the political imperatives of the day when the establishment of a new agency is deemed appropriate. In practice, a closer examination often leads to the conclusion that a single agency could effectively combine the mandates of several performing related functions. Thus, the Macaulay Report suggested that a single Public Utilities Board could deal with energy, telecommunications and transport matters¹⁸² and the Cornish Report recommended a single Equality Rights Tribunal that would hear cases under the *Human Rights Act*, the *Pay Equity Act*, and the *Employment Equity Act*.¹⁸³

The Management Board Agency Reform Project has also been reviewing proposals for the rationalization of the agencies. In some cases, the most effective first step is to look at co-location and the more formal sharing of resources. A preliminary review indicated that many of the efficiencies of rationalization could be obtained by co-location of (usually related) agencies.¹⁸⁴ Co-location permits common hearing rooms, public areas, libraries, and the sharing of other resources, such as photocopiers and some nonexpert support staff.

Cross-appointments also play a critical role in rationalizing the use of resources, including human resources. In some cases, effective rationalization cuts across ministry lines, bringing together mandates associated with several ministries. This requires a realignment of responsibilities among ministries and, consequently, more political will.

Rationalization also raises another question: should agencies be associated with policy ministries or should they derive their support and associated services from the Ministry of the Attorney General, as part of the overall justice system of the province? Alternatively, should a separate body, such as a Council of Administrative Justice System Agencies, provide the associated support and services to agencies? There is a lot to be said for a central body that understands the business of agencies being responsible for these functions.

It must be recognized, however, that these questions may encompass more than who will provide institutional support (e.g., human resources, financial administration) services to agencies. Changing the relationship of agencies with associated policy ministries also affects the responsibility for political appeals and appointments and, for some agencies, powers of policy direction. It has already been suggested that the appointment process should generally

¹⁸¹ For a further discussion of this policy, see, Ron Ellis, "Ontario's Administrative Justice System Agencies: Issues Analysis, Term of Appointments," (unpublished, 1994).

¹⁸² Above, note 21.

¹⁸³ Above, note 57.

¹⁸⁴ See above, "The Co-location and Rationalization Initiatives."

be the responsibility of an independent Council, with recommendations and a "short list" being provided to the Premier. The Premier can, of course, take advice from his or her ministers (or anyone else) on appointments.

Any policy directions and political appeals should also be exclusively the responsibility of the Lieutenant-Governor-in-Council, not individual ministers.¹⁸⁵ Both policy directives and political appeals are extraordinary actions in terms of the day-to-day independence of the administrative justice system agencies. The appeals in particular have been subject to criticism.¹⁸⁶ It is appropriate that both these actions be taken by the Government as a whole, not by individual ministers. In practice, the relevant policy ministries, and their ministers, would continue to carry the responsibility for presenting recommendations to Cabinet on these matters. It is not necessary, however, that administrative and support functions be provided by individual ministries.

Furthermore, the question arises whether the minister responsible for a related policy ministry should be responsible for the administrative justice system agency in terms of reporting to the Legislature. The policy minister cannot speak to the rationale for decision-making of these arm's length adjudicators, nor can a minister become involved in agency decision-making itself. There are temptations, however,¹⁸⁷ and opportunities for influence through the administrative support and resource allocation process. Changing the reporting relationship so that the administrative justice system agencies reported to the Legislature either through the Attorney General (in recognition of their role as components of the justice system in the Province) or through the Premier (in recognition of their multiple responsibilities and the central role of the system in the relationship of the citizen with the state) might reduce the opportunities for inappropriate influences and indicate a recognition of the importance of the administrative justice system.¹⁸⁸

Related to rationalization, of course, is the issue of establishing a single adjudicative body to deal with appeals of administrative decisions. Part of the rationalization process being recommended in Québec involves stripping certain adjudicative functions from existing tribunals and placing them in a single adjudicative appeal body.¹⁸⁹ In this case, adjudicative functions are being removed from already existing administrative justice system agencies (with a range of functions) for the sake of rationalizing appeal functions. In this case, one must question whether the advantages of categorization and rationalization truly outweigh the benefits of having existing expert bodies deal with the subject matter of an appeal. A provincial

¹⁸⁵ These are, in fact, generally a Lieutenant-Governor-in-Council responsibility.

¹⁸⁶ See, Janisch, above note 121; Ratushy Report, above note 32.

¹⁸⁷ For example, the communications of the Hon. Marcel Massé with the CRTC.

¹⁸⁸ It might be argued that changing the reporting relationship might disturb some of the more cooperative relationships that have been developed among individual chairs and bureaucrats and might reduce the significance of individual agencies. I think the benefits of a higher profile and greater attention paid to the administrative justice system as a system outweigh the ephemeral advantages of personal cooperative relationships in an environment of cost cutting and resource reduction.

¹⁸⁹ See, Garant Report, above note 34.

Appeals Tribunal that is not part of a larger regulatory or administrative scheme also runs the risk of violating section 96 of the *Constitution Act, 1867*.¹⁹⁰

The rationalization initiatives begun by the Management Board Agency Reform Project should nonetheless be encouraged. The objectives of rationalization should be improved productivity and effectiveness; rationalization should not become short-hand for simple resource reduction and cost-cutting. In fact, appropriate rationalization may require some initial investment, primarily in relocation of agencies and in such areas as common case management systems and updated computer and information systems.

(c) SOME FUNDAMENTAL QUESTIONS?

(i) What is a "Fair" Procedure?

Many administrative justice system agencies were organized in order to provide faster or more informal procedures for the parties. A common criticism of the agencies is that they have become too "judicialized" or formal and intimidating. The Cornish Report on the equality and human rights processes, for example, stated that consultations found that people called for a streamlined, informal process. It also stated that people wanted the informal process to find out if there has been discrimination and advocated a "discovery" process similar to that found in civil cases. A number of people wanted the human rights investigators to have the power to make orders and one group wanted criminal sanctions to be imposed for racist behaviour.¹⁹¹

A closer examination of these "wants" indicates that there are often contradictory or mutually exclusive. Imposition of criminal sanctions (constitutional issues aside) would almost certainly formalize the process. Similarly, the duty to be fair imposed on human rights investigators,¹⁹² might involve a more hearing-like process if they could make binding orders.¹⁹³ "Discoveries" are essentially a more formalized process of current investigation procedures, which may include interrogatories. "Finding out if there has been discrimination" might be considered a description of the current process, although clearly some users of the system considered it to be something else.

In looking at what is involved in emphasizing an informal or "nonjudicial" process, it is helpful to separate out which agency is being discussed and what issues are being considered. In spite of the number of commonalities among the administrative justice system agencies and their processes—the large number of common steps in the case management system, for example—the specifics differ considerably. What constitutes an "unduly formal" process in one instance would be the bare minimum of an adequately comprehensive process in another case.

For example, some of the economic regulatory hearings are relatively formal. There may be a court reporter, a clerk, numerous exhibits that are all carefully numbered, boxes of

¹⁹⁰ David J. Mullan, "The Uncertain Constitutional Position of Canada's Appeals Tribunals," (1982) 14 *Ott. L. Rev.* 239.

¹⁹¹ Above, note 57, chapt. 5.

¹⁹² See above, note 112.

¹⁹³ It may be noted, however, that the staff of the Ontario Securities Commission effectively make orders in dealing with registrants and prospectuses; their decisions are appealable to the Commission itself. They are not required to hold oral hearings and their processes are not usually as formal as even a "paper" hearing.

evidence, extensive cross-examination, technical language, formal speech, and a reserved atmosphere. Although there are not the trappings of a court with gowns, the process is superficially similar to that of courts. While there are no pleadings exchanged and no discoveries as such, there are prescribed application documents, and several rounds of interrogatories and replies are often filed by the parties and by the agency itself. Only those who are familiar with courts would be sensitive to such differences as the relative freedom in dealing with rules of evidence, the wider area of expert notice in comparison to judicial notice, less formal procedures dealing with qualification of expert witnesses, some greater latitude in introducing evidence, the use of interrogatories, and the tribunal's inquisitorial attitude.

The court-like processes have some historical base, for example, in the establishment of the Ontario Municipal Board as a "court of record." In general, however, much of this process is driven by the subject matter; the type of evidence—voluminous, technical, and often complex; the number of parties and counsel—there may be as many as twenty or thirty parties representing diverse and divergent interests; and the requirement to run a hearing that is not only fair to all the parties, but that also serves the public interest mandate of the tribunal. The result is a fairly structured, formal hearing with a carefully set out schedule and orchestrated roles for each of the players. This should not be confused, however, with an overly "judicialized" hearing.¹⁹⁴

At the other end of the scale is a hearing with a single party dealing with a relatively narrow issue, such as whether a certain factual situation exists that provides an entitlement to social benefits. The ground rules of fairness have not changed, but the nature of the subject matter and of the parties indicates an approach that may be different from those of the economic regulators. This "less judicial" approach, however, should not be confused with casual or informal. Individuals awaiting determinations on social benefits deserve as carefully structured and thoughtful hearing as a Union Gas or Unitel. Informal is not necessarily the hallmark of a good hearing in these circumstances.

A number of criteria have been identified as constituting a "fair" process.¹⁹⁵ People look for:

- Consistency or whether there is similarity of treatment and outcomes;
- "Representativeness" or the degree to which the parties feel they have control over the decision process;
- Accuracy or whether there is an objectively high quality solution;
- Correctability or whether there are opportunities to correct unfair or inaccurate decisions;
- Suppression of bias or reliance on prior views; and
- Ethicality or whether the process accords with general standards of morality and fairness.¹⁹⁶

¹⁹⁴ This is also not to say that people are satisfied with these hearings; hence, the exploration of ADR to narrow the scope and settle certain issues or the use of rule-making and generic hearings to reduce the incidence of the large, expensive regulatory hearings. The complaints focus on delays and expense in a competitive market, not on "judicialization" of process per se.

¹⁹⁵ T. R. Tyler, *Why People Obey the Law* (New Haven: Yale University Press, 1990).

¹⁹⁶ *Id.*, Chapt. 11.

Studies have also shown that consistency, especially consistency in the treatment of people, is the major criterion that people use to assess justice. Interestingly, this process component may even be more important than the perceived fairness of the outcome, although the weight given to process tends to lessen as the importance of the outcome increases.¹⁹⁷ A sense of control over the process is very important, as is the sense that the decision-maker is acting in good faith and taking the parties' views into account.

It is possible for the adjudicator to convey good faith and attention to the parties in both "formal" and "informal" processes. Just as an adjudicator must be concerned about appearing indifferent and bound by procedure in a "formal" context, he or she must be equally concerned about appearing indifferent and casual in seeking greater "informality." A process that involves the parties or a less "judicialized" process should not be perceived as a second class form of justice. While administrative justice system agencies may be legally inferior to the courts, their decisions must not be—or perceived to be—less fair or less accurate in decision-making.

There should also be a greater recognition of a connection between appropriate appointments and training on the one hand and a fair, responsive process on the other hand. People who are competent, confident of their expertise, comfortable in their roles as adjudicators, and chosen in part because they have a sensitivity to the importance of the issues they are adjudicating and the (occasional) vulnerability of the parties, are more likely to provide a fair process. Adjudicators who are uncertain, poorly trained, and insecure in their positions are more likely to insist on the small perquisites of their power and to make procedural and substantive decisions reflecting a lack of confidence rather than the issues before them.

When seeking less intimidating and more streamlined solutions, there is an additional caveat that should be placed on alternative dispute resolution. ADR is not necessarily the answer to those who seek to dejudicialize the system. The solutions reached through ADR mechanisms are not necessarily more "fair" or "satisfying" to the parties when compared to solutions found in an adjudicative process. There are a number of critics who identify problems that may occur when there is a heavy emphasis on negotiated settlement, particularly when one of the parties is disadvantaged in comparison to the other or when one party is a frequent user of the process.¹⁹⁸ There may be quite a difference between "settlement" and "agreement" with agreement occurring relatively rarely when either the issues are emotion-laden or where there is a disparity of power.

Complaints have also been made about what people perceive as the narrow, unresponsive jurisdiction of agencies. Some people do not understand when they are told, "sorry, that is not our jurisdiction," and they consider this response to be a refusal to deal with their concerns or complaints.¹⁹⁹ This is not a complaint limited to the administrative justice system agencies, however. The courts are also often perceived as narrow and unwilling to address the concerns

¹⁹⁷ Most of these studies were made in the criminal context and presumably, O.J. Simpson was more interested in the outcome of his trial than he was in the questions of process.

¹⁹⁸ H. Erlanger, et al., "Participation and Flexibility in Informal Processes: Cautions from the Divorce Context" (1987), 21 *Law & Soc. Rev.*, 585; R.C. Reuban, "The Dark Side of ADR" (1994) *Cal. Law.* 53.

¹⁹⁹ See, for example, Cornish Report, above note 57.

of those who find themselves involved in legal actions.²⁰⁰ There may be no solution to these problems, other than improved education of citizens of the role of courts and administrative agencies. What is important, however, is what the administrative agencies themselves can do in fulfilling this responsibility to educate. Better information about the agencies, their mandates and processes, and easier access to this information may meet a larger need than simply guiding parties through the processes of individual agencies. A better understanding of the systems of government and the role of agencies can lead to a greater satisfaction with the decisions of agencies and government in general.

(ii) How Many Levels of Appeal?

The issue of fair and consistent treatment of persons stands behind much of the administrative justice system structure. A vital element of fairness is that when a decision affects a person, whether it be a natural or corporate person, in an important way, there be some body or individual the person can go to in order to have the decision reviewed. An examination of the system, however, indicates that in some cases there may be too many opportunities for appeal (the pre-October, 1995 WCB system) or too few (the SARB system). Generally, a greater emphasis needs to be placed on the accuracy and consistency of lower level decision-making, with an opportunity for review to correct obvious errors. Appeals, particularly those that involve oral hearings, should be used more rarely. Multiple levels of appeals increase the complexity and incomprehensibility of the system, as well as its costs and the opportunities for inconsistencies.

It is not possible to make either generalizations or to suggest reforms to specific agencies on the basis of this review, but it does raise some broader questions. When an appeal body deals with a lower level decision, what is the appropriate standard of review (particularly when there has been an internal review in the lower body prior to an appeal)? Should the appeal be *de novo* and should the standard be correctness? Or should the appeal body be concerned that the lower decision was reasonable and consistent with prevailing interpretations and norms? Do multiple levels of decision-making and appeals on a correctness standard create incentives for careless decisions or reduce the sense of responsibility of the initial decision-maker? Do multiple appeals allow the initial decision-maker to pursue an agenda other than accurate and fair decision-making, such as fiscal restraint, since egregious errors will be corrected?

The role of the Ombudsman may also be underestimated in correcting errors and unfairness in decision-making. The tendency to ensure appeals, particularly multiple appeals, originated before the establishment of the Office of the Ombudsman. In assessing the fairness and efficiency of decision-making systems, the opportunities for correction presented by the Ombudsman should be considered.

(iii) Why Does the Reputation of the Administrative Justice System Matter?

The administrative justice system, in Ontario and in other Canadian jurisdictions, has a mixed reputation. To some degree, it could be summed up in a comment of the Chief Justice of Canada, the Hon. Antonio Lamer, in a speech to CCAT: "...considering the conditions

²⁰⁰ See, for example, Sally Engle Merry, *Getting Justice and Getting Even* (Chicago: University of Chicago Press, 1990).

under which our members of boards and commissions operate, I have always been surprised that we Canadians have generally enjoyed such a high quality of administrative justice."²⁰¹

Improving the reputation of the system is not a trivial matter. More citizens come into contact with the administrative justice system than with the courts. Their views of the justice system as a whole may be influenced by their experiences with agencies. Studies also indicate that experiences with various parts of the government decision-making system, including agencies, can influence citizens' views on the legitimacy of the law and government in general. Experience with one part of the system can affect willingness to comply with the law in another part, not just in the area where the individual believed he or she was treated unfairly.²⁰² In other words, poor perceptions of the administrative justice system can lead to reduced respect for the government generally and thus, to reduced compliance. Poor appointments, inadequate training, poor quality decisions, lack of consistency, inadequate resources for case management—these all have an effect felt more broadly than the individual adjudicator, case or even the specific tribunal. It is in the government's interest to ensure that some fundamental reforms are made to the administrative justice system for it can influence the citizen's relationships with government more profoundly than commonly believed.

(d) CONCLUSIONS AND RECOMMENDATIONS

This study does not purport to be a detailed examination of individual agencies, their mandates, responsibilities, structures, or processes. While half a dozen agencies have been examined in greater depth, these examinations could hardly be called detailed. Nonetheless, several issues call for further attention and some general recommendations for the improvement of the system are possible.

1. The quality of the first level decision-maker is important; there is some indication that the initial decision-maker does not receive the appropriate attention or emphasis in several processes. The individuals in provincial or municipal bureaucracies that deal with social assistance claims would appear to be making too many errors if the successful appeal rate at SARB is an accurate indication. The importance of this concept is being acknowledged by the new process at the WCB, which will place a greater emphasis on the accuracy of initial decisions and place a greater onus on the applicant for appeal to indicate reasons.
2. There is also an indication that, where a process is not initiated at an agency (e.g., a licence application to the Liquor Licence Board or a rate application to the Energy Board) but instead involves lower level decisions (e.g., by a ministry, a municipality, or another agency), the processes should, at some stage, be viewed as integrated. This is not to suggest that the independence and autonomy of the agency should be compromised, but to urge that the interrelationships between decision-making at the different levels be recognized. The administrative justice system agencies can be heavily affected by decisions and policies taken by other bodies. More cooperative relationships should be established, including methods of

²⁰¹ "Administrative Tribunals—Future Prospects and Possibilities," (1991) 5 *C.J.A.L.P.* 107 at 118.

²⁰² See Tyler, above note 195, Part II, "Legitimacy and Compliance."

communicating policies and educating the bureaucratic officials about the implications of important decisions.

3. Administrative justice system agencies must have adequate case management techniques, including methods of identifying major or urgent cases. "First come, first served" is not always the fairest or most efficient way to deal with cases. Similarly, case management systems should aid agencies in identifying issues suitable for generic proceedings or rule-making.
4. In developing better case management systems, the administrative justice system agencies should consider the need for better data collection for both their own uses and for broader uses, such as the evaluation of alternative procedures and the more knowledgeable setting of social and political priorities.
5. Administrative justice system agencies should be encouraged to use generic and policy proceedings. For some agencies, this may require legislative changes to enabling acts that emphasize or mandate individual decision-making. Even those agencies that emphasize case-by-case adjudication, however, can make greater use of policy proceedings and policy statements that would be applicable, without fettering, to the individual cases to improve the consistency and quality of decisions. Encouragement of generic proceedings should recognize that this type of proceeding may be difficult for those agencies with only part-time members; the appointment and processes should keep this factor in mind in determining the terms and conditions of appointment of agency members. A larger agency may be able to make better use of these proceedings; the agency reorganization process should consider this. Generic proceedings may also require the availability of funding for the participation of certain disadvantaged groups in the process.
6. Administrative justice system agencies should be granted rule-making powers, either broadly or in selected areas depending on their individual mandates. Rule-making should be a public process and agencies should be required to begin consultations with the affected public as soon as possible, preferably at the problem-definition stage. Draft rules should be published, with a reasonable period of consultation and comment permitted. The draft rules should be submitted to the government (minister or Lieutenant-Governor-in-Council) for approval before promulgation.
7. Administrative justice system agencies should publish, after consultation with affected groups, the minister, and ministry officials, annual Statements of Priorities. The Statement can be adjusted to include a form of "regulatory agenda" to provide advance notice of the regulatory intentions of those agencies that will be using generic or policy proceedings or rule-making proceedings in the coming years. Annual reports of agencies should include an assessment of the activities of the agency in the past year in comparison to the projected activities and priorities as set in the Statement of Priorities for that year.²⁰³

²⁰³ An example of a Statement of Achievements and Targets, including criteria against which success will be judged can be found in the Annual Reports of the Australian Administrative Appeals Tribunal.

8. Administrative justice system agencies should be encouraged to continue to use and experiment with alternative dispute resolution techniques. The ADR consultancy established by the Management Board Agency Reform Project should be encouraged, subject to evaluation, and continued if appropriate. Evaluation should include the development of better criteria to identify when a case is suitable for ADR and techniques for addressing imbalances of power and public interest mandates.
9. Appeals from the decisions of administrative justice system agencies to the courts should be eliminated or curtailed. If appeal provisions remain, they should be rationalized to permit only appeals on questions of law, with leave of the court. Greater emphasis should be placed on the rehearing and review powers possessed by all Ontario agencies, with additional emphasis on the role of the Ombudsman. Procedures for appeals should allow agencies to file affidavits with the courts to share expertise and experience.
10. Judicial review should be the mainstay of the superior courts' supervision of the administrative justice system. While deference to certain types of expertise continues to be appropriate, the courts should also welcome evidence of expertise in the form of affidavits to provide background to agency decisions in complex areas of policy or regulation.
11. The expertise of the Divisional Court should be strengthened. The original intention of the McRuer Commission to recommend a court that would develop an understanding and expertise of the Administration should be implemented.
12. An Ontario Administrative Justice System Council should be established to deal with such matters as discipline, investigation of complaints, enforcement of Memoranda of Understanding, performance appraisals, liaison with the training and other work of SOAR, and ongoing policy and research on administrative justice. The government should look to the models of the U.S. Administrative Conference or the Australian Administrative Review Council in developing the policy advisory mandate of the Ontario Council.
13. The process of appointments to administrative justice system agencies should be depoliticized. The Ontario Judicial Appointments Advisory Committee is a possible model. An independent body that advertises vacancies, establishes selection criteria, interviews candidates and provides a ranked list of candidates to the Premier should be established. The Administrative Justice System Council could perform these functions. Employment contracts providing for transition compensation at the end of terms or for settlements on dismissal, without cause, should also be routinely entered into by the government and order-in-council appointees. All administrative justice system appointments should be the responsibility of the Premier, with confirmation by the Lieutenant-Governor-in-Council, in recognition of the importance of the administrative justice system.
14. The rationalization initiatives begun by the Management Board Agency Reform Project should be encouraged. This includes more extensive use of cross-appointments and more effective use of the human resources represented by the members of the administrative justice system agencies. Serious consideration

should be given to removing the responsibility for administrative support from individual ministries and consolidating these into a single body, possibly the Administrative Justice System Council.

15. As part of the rationalization process, the issue of the number of appeals that are appropriate for certain decisions affecting the interests of citizens should be addressed. In general, it appears that there is often more emphasis in the system on providing multiple appeals rather than on treating the citizen fairly and competently at first instance. Where more than one level of appeal or review exists, consideration should be given to limiting the upper levels of appeal, by means of a requirement for leave to appeal, and focussing these appeals on matters of policy or statutory interpretation, major inconsistencies, or clear injustices. As competence improves in lower level decision-making, greater deference by the appeal agencies may be deserved.
16. The administrative justice system agencies should be treated as the single system that it is. This could be enhanced by having all these agencies report to the Legislature through the Premier or the Attorney General rather than through various individual ministers. All policy directives and political appeals, if they continue to exist, should be the responsibility of the Lieutenant-Governor-in-Council, not an individual minister. This is an extraordinary intrusion into the business of an agency that should be authorized only by the Government as a whole.
17. The role that the administrative justice system agencies play in shaping the citizens' perceptions of government and in creating or maintaining respect for government deserves greater recognition. These agencies are often the points of contact for many citizens with government and are sometimes called the "face of government." Actions that fail to enhance the reputation of the agencies, such as the failure to appoint and train competent people, may have broader ramifications than often realized.

TOPIC VII

BARRIERS TO ACCESS TO CIVIL JUSTICE FOR DISADVANTAGED GROUPS

BARRIERS TO ACCESS TO CIVIL JUSTICE FOR DISADVANTAGED GROUPS

IAN MORRISON & JANET MOSHER

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BARRIERS TO ACCESS TO CIVIL JUSTICE FOR DISADVANTAGED GROUPS

IAN MORRISON & JANET MOSHER

1. INTRODUCTION

The purpose of our paper, as articulated in the project description prepared by the Fundamental Issues Working Group, is to “provide an overview of barriers to access to civil justice facing disadvantaged groups (ie. the poor, women, racial minorities, persons with disabilities)”.¹ But what is meant by “access to civil justice”, by “disadvantage” or “disadvantaged groups” and what does “disadvantage” mean in relation to civil justice? Grappling with these questions at the outset is essential for without at least tentative answers to them, there is no coherent framework for a discussion of what it is that currently impedes access to civil justice and what needs to be done to bring the aspiration of access to civil justice for “disadvantaged groups” closer to a reality.

(a) DISADVANTAGE AND “DISADVANTAGED GROUPS”

The terms of reference for our study define “disadvantaged groups” only by reference to example. The particular examples given are “the poor, women, racial minorities, [and] persons with disabilities”. This approach to defining disadvantage by illustration is extremely common in the literature; the recitation of a rambling list of groups or of characteristics which frequently tracks those enumerated in Human Rights legislation or the *Charter of Rights and Freedoms*. It has been critically described as the ‘commatization’ approach to disadvantage,

... a punctuational device whereby individual groups are enumerated as a proxy for a larger classification, as, for example, when diverse categories of people are listed, such as “social class (comma) women (comma) blacks (comma) gays (comma) youth (comma) and so forth.” The concern is that the array of commatized groups in this example not only suggests that all characteristics are of equal significance, but also submerges the intersections between different forms of oppression.²

As suggested in the above quote, one limitation of the commatization approach is its failure to capture the intersectionality of multiple forms of oppression. The disadvantage many people experience derives from the reality that they are simultaneously members in more than one oppressed group. The intersection of these various axes of oppression shapes the nature of oppression. So, for example, a black women experiences oppression and consequent disadvantage of a particular form in which the racism she experiences is shaped by the fact that

¹ Civil Justice Review Project, description of commissioned research papers for the Report of the Fundamental Issues Working Group, paper 7, “Barriers to Access for Disadvantaged Groups”.

² Marlee Klein, “Race, racism and feminist legal theory” (1989), 12 Harvard Women’s Law Journal 115 at 146, 147 citing Mary O’Brien, “The commatization of women: Patriarchal fetishism and the sociology of education”, 15 Interchange 43, 43-44 (1984).

she is a women, and the sexism she experiences is shaped by the fact that she is black.³ Attention to multiple and intersecting forms of oppression is critical to any discussion of “access to justice”, even the most narrow and instrumental conception of access to justice. For example, the barriers to accessing the civil courts, (let alone getting justice once there) faced by a poor, black, single mother are products not simply of her poverty, her race, her gender and her membership in a family structure that has been legally and socially constructed as deviant and suspect, but of the inter-relationship of all these aspects of her identity. The inter-relationship of these aspects of her identity will also have a profound effect on whether the civil courts, or any other forum for institutionalized dispute resolution, have any relevance to the main disputes that arise in her life and whether she believes these forums capable of dispensing justice.⁴

Related to the obfuscation of intersectionality is the worry that the commatization approach projects a homogeneity within groups which belies the reality of tremendous diversity amongst group members—diversity which is at least in part attributable to the fact that multiple and different axes of oppression intersect the lives of particular members of the group.⁵ The nature and depth of the economic, political and social exclusion experienced by group members varies widely.

The term “disadvantaged group” is itself problematic; it is both too passive and too static. It is too passive in the sense that it is suggestive of a life condition which simply exists, rather than one that is constructed (brought into existence) through oppressive and discriminatory actions. In other words, it obscures the fact that there are culpable (responsible) actors who are implicated in creating and maintaining these conditions of life. It is too static in the sense that it assumes that those, and only those, identified as belonging to these groups, suffer under conditions of disadvantage. The list presupposes that all those on the list are “disadvantaged” and those who are left off the list are not. But there are many who suffer economic, social and political exclusion who are not on the list. For example, if we were to look at indicia of oppression (like poverty rates) then one of the most seriously “at risk” groups in Ontario are young families; yet they never appear on the lists generated by the commatization approach.

A final observation to be made relates to the inequitable distribution of public power. Those with access to state/public power are able, if they choose, to define the needs of “others”, to

³ Nitya Iyer, “Categorical Denials: Equality Rights and the Shaping of Social Identity” (1993), 19 *Queen’s Law Journal* 171.

⁴ For example, many women of colour have observed that current anti-discrimination law requires that they box their experiences into either the category of race or of gender. This compartmentalization and the requirement to choose as between race and gender fail to capture their lived experiences of discrimination. As such, resort to anti-discrimination law may be unavailable (there is no appropriate legal category) or unappealing (the experience could be made to fit into a box, but only with considerable distortion). See Iyer, *ibid.*

⁵ Susan S. Silbey makes a similar observation. In reporting on her research exploring the perceptions and experiences of the courts and law by minority and non-minority citizens she notes that there was often as much variation among minority groups as between “whites” and “non-whites”. She adds the critical observation that frequently too much attention is given to the differences between “whites” and “non-whites” and the important differences in culture, history, experiences, and resources among and within racial groups are overlooked. Susan S. Silbey, “The Litigants’ Perspective on Civil Justice” in Ontario Law Reform Commission, *Study Paper on Prospects for Civil Justice* (Toronto: Ontario Law Reform Commission, 1995) 259 at 268.

determine appropriate interventions, etc.⁶ The Civil Justice Review project, in this respect, is no different. Who is defining what access to civil justice means? Who is determining the needs of “disadvantaged groups”? Who is setting the discourse on access to justice and reforms?⁷ These questions leave us, as they should, somewhat uncomfortable in proceeding with this project since both of us are relatively privileged in our lives. This paper gives us an entrée into the process that others do not enjoy. We argue throughout the paper that meaningful participation of members of “disadvantaged groups”—be it in the preparation of legal education materials, in the dispute resolution process, in the formulation of legal norms or in the shaping of public policy—is a fundamental principle of access to justice. The Civil Justice Review has undertaken a limited, yet important, consultative process with representatives from various organizations which offer services to those who are politically, socially and/or economically marginalized. As discussed later in the paper, advocates (be they legal or others) are not transparent conduits for the perspectives, beliefs and interests of the people for whom they/we advocate. Ideally, the Civil Justice Review would have developed a consultation process in partnership with organizations that have strong links to community voices and are under community control so as to tap the perspectives, beliefs and interests of “disadvantaged people” on justice issues.⁸ However, the limited consultations which were undertaken certainly provide the best evidence of these perspectives. Respect of these voices and perspectives is a first step—and we would add an absolutely necessary step—in the quest for civil justice for “disadvantaged groups”.

(b) ACCESS TO CIVIL JUSTICE

There is an extensive literature on “access to justice” and several taxonomies which attempt to categorize the multiple conceptualizations of access to justice which underpin this literature. We find Roderick Macdonald’s observations about the access to justice movement and the literature which the movement has spawned particularly apt;

I suggest that the history of the access to justice movement is a history of the false separation of means and ends ... As a consequence of this false separation, its history is also a history of the successive displacement of scholarship and political interest: a displacement first, from justice to law; and then, from law to access to justice; and most recently, from access to justice to access to law. Put schematically, we can say that two separate surrogacies along two distinct axes have occurred: a surrogacy of content—from justice to law...; and a surrogacy of form—from substance to access...

...As I read it, mainstream access to justice literature is largely instrumental; it is a literature about access to law, rather than access to justice. In this perspective, whatever else justice might be for philosophers, it is, for access to justice proselytizers, fundamentally a product marketed by the state

⁶ See Nancy Fraser’s excellent piece on needs discourse wherein she discusses political contestation over the legitimation of “needs”, needs definition and needs satisfaction, “Talking About Needs: Interpretive Contests As Political Conflicts in Welfare-State Societies”, [1989] *Ethics* 291.

⁷ Deborah Hensler notes that “civil justice reform efforts too frequently emerge from relatively closed discussions among lawyers and judges, with little serious effort to engage either the lay public or interested groups of litigants; including business people, consumers, civil rights activities [sic], etc.” Deborah R. Hensler, “Comment on “Prospects for Civil Justice””, Ontario Law Reform Commission, *supra* note 5, 235 at 236.

⁸ We do not mean to suggest by this that none of those consulted experience or have experienced disadvantage.

though its dispute processing agencies to which all citizens should have access. Justice is neither an aspiration, nor an ideal which demands engagement by those who pursue it. Rather, like data-banks stored by computer systems, justice is a commodity which can be made more accessible by removing interfering obstacles. Access to justice is, therefore, really about access to the systemic equivalent of hardware—to the processes and institutions of formalized law.⁹

Mary Jane Mossman and Heather Ritchie, in their review of the Canadian literature on access to justice, identify three operative conceptualizations of access to justice and their programmatic spin-offs: access as efficiency (reduce cost, delay, complexity); access to justice for new litigants in new settings (make equal access to justice more effectively available through legal aid schemes, through more accessible law, and through the legal representation of diffuse interests); and access to justice as a justice issue. They conclude that the Canadian literature is not only pre-occupied with access, (as Macdonald suggests) but with an exceedingly narrow conceptualization of access—that of access as efficiency.¹⁰

Our reading of the materials generated to date by the Civil Justice Review suggests that the operative conceptualization of access to justice closely tracks the “access as efficiency” conceptualization and reflects the commodification approach of which Macdonald speaks.¹¹ The terms of reference, for example, identify expense and delays in obtaining justice as the problems; more efficient, less costly, speedier and more streamlined justice as the goal of the review.¹² The terms of reference appear to presuppose that justice is obtained once a court is accessed. Similarly, the language of efficiency is pervasive in the *First Report*; what is sought is a speedier, more streamlined, more efficient structure to maximize utilization of public resources.¹³ Indeed there are even hints in the Report of deep hostility towards a conceptualization of access to justice as a justice issue. For example, the Report notes,

... [t]here is more civil litigation. It is more complex. It takes longer to prepare, to settle and to try. It is fostered by an increasingly “rights-oriented” and litigious society; enhanced in the prism of mass media coverage; and nurtured by a continuing onslaught of legislation from all levels of government giving people more and more opportunities to go to court.

⁹ Roderick Macdonald, “Access to Justice and Law Reform” (1990), 10 Windsor Yearbook of Access to Justice 287 at 289-90 & 294. Andrew Roman also notes the equation of access to justice with access to the courts or to law; see Andrew J. Roman, “Barriers to Access: Including the Excluded” in Allan C. Hutchinson (ed), *Access to Civil Justice* (Toronto: Carswell, 1990) 177 at 178 & 184.

¹⁰ Mary Jane Mossman and Heather Ritchie, “Access to Civil Justice: A Review of Canadian Legal Academic Scholarship 1977-1987” in Hutchinson (ed.) *supra* note 9 at 53. Mauro Cappelletti, commenting on the American experience, identifies three “waves” in the access to justice movement: a focus on economic obstacles; a focus on organizational obstacles, particularly those preventing the pursuit of diffuse or collective rights and interests; and a focus on procedural obstacles (in which traditional, contentious litigation in court is understood not to be the best way to provide “effective vindication of rights” and attention shifts to alternative dispute resolution). See Mauro Cappelletti, “Alternative Dispute Resolution Processes Within the World-Wide Movement” (1993), 56 Modern Law Review 282.

¹¹ The specific materials include the Terms of Reference for the Civil Justice Review and the *Civil Justice Review, First Report* (hereafter the “*First Report*”) (Toronto: Ontario Civil Justice Review, March 1995). The terms of reference can be found in the *First Report* and in the Ontario Law Reform Commission Study Paper, *supra* note 5.

¹² Terms of reference, *supra* note 11.

¹³ *First Report*, *supra* note 11 at 3 - 4.

These developments pose serious threats to the civil justice system which, simply put, is in a crisis situation.¹⁴

There is a sense conveyed by this passage that the creation by legislative bodies of rights and entitlements, and efforts to enforce those rights by would-be rights-holders, are problems to be got rid of, rather than, perhaps, as indications of a shift towards the realization of greater substantive justice. This is particularly troublesome given the fact that much of this new regulation is the front of the "hollowed out" welfare state, (see discussion *infra*).

Whether the fundamental issues component of the Civil Justice Review envisions a broader conceptualization of access to justice is less than clear. W.A. Bogart, in his comments on Roderick Macdonald's background paper for the Civil Justice Review, identified this ambiguity.¹⁵ Is this project about civil courts and alternative dispute resolution ("A.D.R.") as alternative models of dispute processing? Or is it about "justice" and the administrative state?

In order to infuse the concept of "access to civil justice" with content and meaning relevant to the lives of "disadvantaged groups", and to identify the impediments to its attainment, we contemplated meeting with small focus groups of "disadvantaged persons". One of the authors approached an active and successful low income self-help organization in Ontario which has organized numerous consultations on a wide range of issues of concern to poor women, welfare recipients, etc. He was met with considerable initial enthusiasm when he discussed the project as "barriers to access to justice for disadvantaged people". As he proceeded to explain that the project did not however include criminal courts or family courts, and that the main focus of the Civil Justice Review did not seem to be on improving the "tribunals of everyday life"¹⁶ (their procedures and the statutory programs which they interpret and apply) to enable them to deliver greater substantive justice for people on the margins, the response changed from enthusiasm, to complete disinterest. This is a telling anecdote about the meaning of "access to civil justice" for people on the margins and it signals the necessity of stepping back momentarily to situate the civil justice review in the larger political, economic, and social context within which "disadvantage" is being created and distributed, and within which the meanings of "justice" and "access" are being contested.

(c) CIVIL JUSTICE AFTER THE WELFARE STATE

Much of the function of what we call the "welfare state" to date has been to regulate the consequences of "disadvantage" in relation to the profoundly unequal market distributions of the means necessary to attain and maintain welfare. This takes place through a multitude of services and programs funded and delivered directly and indirectly by governments and state bureaucracies. This includes—to mention just a few of those within provincial jurisdiction—social assistance (welfare, family benefits, disability benefits, vocational rehabilitation),

¹⁴ *First Report*, *supra* note 11 at 3.

¹⁵ Bogart asks, "Is it [the civil justice review] to canvass the entire range of options in dealing with dispute processing? Or is it only to focus on courts and A.D.R. as alternatives to each other?" William A. Bogart, "Comment on Fundamental Review of the Ontario Civil Justice System", Ontario Law Reform Commission, *supra* note 5, 189 at 190.

¹⁶ As many commentators have pointed out, and as we discuss further below, for marginalized people, the legal sites of greatest importance to their everyday lives are the numerous tribunals that adjudicate access to government benefits, anti-discrimination laws and, for women, family courts.

workers' compensation, residential tenancy protection, rent control, long term care legislation, mental health and consent to treatment legislation, criminal injuries compensation, human rights legislation, the various pieces of legislation which govern employment standards for non-unionized workers (the *Employment Standards Act*, the *Occupational Health and Safety Act* etc.) and so on.

These programs, both individually and cumulatively, affect large numbers of people. In March of 1995 there were over 1.3 million people in families on social assistance in Ontario.¹⁷ There are some 200,000 sole support parents on social assistance in Ontario. There are about 150,000 people with disabilities on social assistance, about half of whom have developmental disabilities or severe psychiatric or psychological problems. Life on the margins of advantage is often not very pleasant. For some people poverty is a transient phase in life. For many—generally those who are the most disadvantaged in other ways: single mothers, elderly women, people with disabilities, aboriginal people, people who cannot read or write English or French—it is not.

Not surprisingly then, for the most marginalized and disadvantaged, the sites where disputes with potentially “legal” aspects are most likely to arise are in relation to the welfare state, to landlords, to people and institutions which control their access to the basic necessities of food, shelter, and so on.

The above paragraphs describe something of the legal landscape within which disadvantage is currently deployed. However, this landscape itself is changing rapidly. Mary Jane Mossman, writing about access to justice in 1988, quoted with approval the observation of Geoffrey Palmer that: “[t]he access to justice perspective is an enriching method of analyzing the problems of the modern welfare state”. Less than ten years later, however, the fundamental assumption of that statement is questionable. We can no longer assume the “welfare state” as we have known it. The economic, social and political consensus underlying the welfare state as we have understood it for several decades no longer exists and the institutions, structures and programs that resulted from that consensus are similarly changing.¹⁸

We must assume that with these changes there will be equally important changes in how “law” operates around disadvantage, that the nature and locations of disputes and how they are legalized will shift and that the way in which marginalized people imagine/don't imagine, assert/don't assert, and access/don't access “justice”, both individually and collectively, will change likewise. As this is a “fundamental” review, supposedly to look at the root structures of the justice system and imagine what branches these might throw off for many years to come, it is worth considering what the post-welfare state might look like from the perspective of disadvantage. There are four related aspects to this direction of change.

The first is relatively straightforward. The poor are getting poorer and are going to get a lot poorer as the state withdraws from its role in compensating for the market distribution of disadvantage. Market distribution of income and wealth has always been unequal in Canada. It is only because of the existence of welfare state programs that this unequal distribution has

¹⁷ All social assistance statistics are from the Statistics and Analysis Unit, Ministry of Community and Social Services, March 1995.

¹⁸ The body of literature analyzing these changes is enormous, spans many disciplines and political orientations and is growing rapidly. See for example, Jessop, “Towards a Schumpeterian Workfare State? Preliminary Remarks on Post-Fordist Political Economy” (1993), 40 *Studies in Political Economy* 7.

been somewhat ameliorated.¹⁹ Compared to other advanced industrialized countries (except of course the United States), Canada's record in the alleviation of poverty and the amelioration of disadvantage is not particularly good, but there have been clearly measurable effects and in some areas, such as relief of elder poverty, quite notable ones.²⁰ However, both aspects of this picture are rapidly changing for the worse from the perspective of the presently "disadvantaged" and those at risk of marginalization. On the one hand, market allocations of income and wealth are becoming increasingly polarized and the rate of polarization is accelerating.²¹ On the other hand, the state is withdrawing from redistributive action of all kinds, (primarily social spending but increasingly also through the tax system) at a rate unprecedented in our lifetimes. Furthermore, attacks on social spending are aimed precisely at the social spending targeted at the most disadvantaged, whose interests are being sacrificed to maintain the programs most politically popular with the relatively advantaged, like medicare: total federal support for health care and post-secondary education will decline by 4.4% from 1993-4 to 1997-8; while transfers for social assistance and welfare programs will decline 38% in the same period.²² The newly elected Ontario government has announced that welfare rates for all but a few categories of social assistance recipients in Ontario are to be slashed to a degree that can only be described as savage. The announced rate cuts will take many social assistance recipients in Ontario below the levels considered necessary for subsistence by the right wing lobby group, the Fraser Institute. Rates are already below all other commonly recognized poverty lines. Sadly, what the future holds is all too clear: far more poverty and insecurity, an explosion of hunger and homelessness, illness and family breakdown; and this will hit certain groups—single mothers, people with disabilities, visible minorities, aboriginal peoples, young families, to name a few—much harder than others.²³

¹⁹ K. Battle, *Government Fights Growing Gap Between Rich and Poor* (Caledon Institute, 1995); A. Yalnizian, *Market Madness: The Distribution of Money and Time Over the Last 20 Years* (Social Planning Council of Metropolitan Toronto, 1993); Canadian Centre for Policy Alternatives *CCPA Monitor* Vol 1 No.9 (March 1995) 1.

²⁰ D. Mitchell, *Income Transfers in Ten Welfare States* (Avebury, England, 1991); D. Ross, E.R. Shillington, C. Lochhead, *The Canadian Fact Book on Poverty - 1994* (Ottawa: Canadian Council on Social Development).

²¹ For example, the polarization of family received market income has accelerated more in the last six years than in the previous 14. From 1987 to 1993 the richest 30% of families' share of income grew two to three times faster per year than it did between 1973 and 1987, while the bottom half of Canadian families have been losing income as fast as the upper 30% have been gaining it: *CCPA Monitor*, *supra* note 19 at 1. See also *Family Security in Insecure Times* (1993: National Forum on Family Security).

²² 1995 Federal Budget.

²³ The human consequences of poverty are well-known and need not be discussed in any detail here. They include markedly increased incidence and duration of physical and mental illness and social disintegration (especially when occurring in times of economic and social instability). The risks of prolonged poverty for children, especially those facing other barriers to equal participation, are especially well documented—and distressing as a predictor of the future of the social fabric. The literature on these issues is enormous and will not be cited here. On a more immediate level, the consequences of massive cuts to general welfare spending in numerous states of the United States over the last decade have been reported, and were depressingly predictable: Centre on Social Welfare Policy and Law, Punb. No. 805, *Jobless, Penniless, Often Homeless: State General Assistance Cuts Leave "Employables" Struggling for Survival* (Washington: Centre on Social Welfare Policy and Law, 1994).

Secondly, the way that "welfare" services are provided and the ways in which lives are regulated through the provision of welfare are also changing.²⁴ They include major shifts of services and programs away from direct state provision to what Marianna Valverde calls the "non-governmental social service sector", (this is sometimes called privatization but that term is misleading because the state retains a dominant presence through direct regulation and through the leverage of funding and auditing decisions).²⁵ A proliferation of new regulation accompanies this shift, including new area or topic specific codes of conduct, state-imposed contractual terms and bills of rights governing "private" provision of welfare services.²⁶

Thirdly, the main income maintenance programs operated by the state are being profoundly and rapidly transformed into contingent supports overtly designed to be functional to supposed labour market imperatives, at the expense of the entitlement model flowing from the welfare state conception of social citizenship.²⁷ In this redesign they are also becoming formally integrated into the operations of the labour market with important implications for their administrative structures and practices and the kinds of disputes they are going to generate in the future.

The fourth is not structural or concrete, but complementary and essential to the above. The above changes have a mutually constitutive and reinforcing relationship with a new ideology of poverty and disadvantage; an ideology which includes individualistic explanations of poverty, tremendous public and media backlash against claims for inclusion by women, racial minorities, etc., a marked (and measured) increase in xenophobia and racism, and manifested in public policy statements, and major funding cuts or outright defunding of advocacy organizations at federal and provincial levels who have spoken specifically on issues of systemic inequality and disadvantage. Furthermore, as with income and wealth, there is a marked polarization in social priorities as between the elite in Canada and the general public, an issue to which we return below in our discussion of the personnel of the justice system.²⁸ This shift at the level of ideology is no less important than the concrete shifts to the operations of "law" in the lives of those who will lose in this new redistribution of income.

These changes are happening so rapidly and are so complex that it is impossible to predict with any confidence where they will end up or when or how a new equilibrium in the political economy will assert itself. However, some consequences are obvious: even less access to the

²⁴ See generally, N. Rose and P. Miller, "Political power beyond the state: Problematics of Government" (1992) *British Journal of Sociology* 173; N. Rose, "The Death of the Social? Re-figuring the Territory of Government", [forthcoming in Frank Pearce and Marianna Valverde (eds.) *Economy and Society*, Special Issue: Radically Rethinking Regulation]; and J. Rekart, *Public Funds, Private Provision: The Role of the Voluntary Sector* (Vancouver: U.B.C. Press, 1993).

²⁵ M. Valverde, "The Mixed Social Economy as a Canadian Tradition" [forthcoming].

²⁶ These range from major new initiatives which seek to profoundly restructure entire areas of social regulation (as for example, the *Long Term Care Act*, which contains examples of every one of the changes identified) to educational speech and conduct regulation, semi-private regulation but regulation which may nevertheless affect large numbers of people.

²⁷ Jessop, *supra* note 18.

²⁸ See note 19, *supra*. As we discuss later with respect to advocacy services, almost all of the existing routes of access to public policy-making on issues of concern to marginalized groups are under severe attack -- access to justice in this fundamentally important sense is thus also disappearing.

legislative realm; less ability to access the elite systems of legal disputations; less systemic advocacy—a de-centring of many disputes from the state as a consequence of marketization of social welfare services (i.e. many issues that now flow from an individual/state relationship will flow from an individual/"private" (or third sector relationship) and this will have implications not only for ordinary disputes but for the focus of systemic issues); different or augmented privacy concerns; and new disputes from the welfare/market hybridized programs. Few if any of these will be in courts in the first instance, but the courts as a site of second level administrative regulation²⁹ will, or may be, be very important (and there is no reason to be very optimistic about what they will do).

(d) THE QUEST FOR CIVIL JUSTICE

As the above discussion suggests, any attempt to discuss "justice" in relation to the "disadvantaged" is incoherent if it is not related to the broader social, political and economic context within which the "justice" system operates. The undeniable fact is that for the disempowered and disaffiliated in Ontario the broader context is, as described above, one of dramatically increasing "injustice" on virtually every front. For marginalized people, "justice" requires fundamental social, economic and political change, including a dramatic about-turn in the current retrenchment of the welfare state. Improving the efficiency of the courts—the central occupation of the *First Report*—when understood in this broader context, seems at best, only peripherally linked to the enhancement of civil justice for members of "disadvantaged groups". Indeed improved efficiencies of the courts (or of administrative tribunals) may result in marked injustice for "disadvantaged people". The reduced workload of courts and administrative tribunals brought about through the continued retraction of state benefits and entitlements and/or the continued retraction of advocacy services may result in increased efficiency (a decrease in public costs, and decreases in delay) but it would be wrong to characterize this outcome as consistent with access to civil justice for "disadvantaged groups".

Let us accept then that this Review is about neither end of the access to justice spectrum; it is neither about the sorts of sweeping economic, social and political reforms necessary to bring justice to the lives of the "disadvantaged" nor (only) about improved efficiency of courts and administrative tribunals. Between these two ends of the "access to justice" spectrum there obviously lie a great deal of possible conceptualizations of "access to civil justice". The vision which we articulate below and which informs the remainder of the paper is one which at the most general level, restricts for the purposes of this Review the concept of "access to civil justice" to access to what might be called "state law and the justice system". As such, we neither touch upon the fundamental social, economic and political reforms that justice requirements might dictate, nor upon the centrally important issue of equal access for disadvantaged groups to the legislative realm.³⁰

²⁹ Courts will, for example, continue to have considerable powers over the operations of the administrative state through statutory appeals, judicial review, sites for the adjudication of common law doctrines which affect administrative operations, and the ultimate arbiters of the *Charter* and human rights doctrine in Canada. We address this role further below in our discussion of the personnel of the judicial system.

³⁰ As Macdonald argues, "[i]n an even larger perspective of formal law we must also consider access to legislative institutions. Should not the notion of equal access also comprise equal access to the legislative body which most often announces the state normative order defining the rights and entitlements thought to ensure justice? Conceived in this fashion, equal access would demand the allocation of equal resources to all citizens in order to influence

Courts and administrative tribunals are forums wherein social power is exercised and from which the “disadvantaged” have been, if not wholly excluded, greatly under-represented.³¹ Multiple injustices flow from this exclusion; the injustice of having no means to advance a valid defence; the injustice of having a legal right or entitlement but no means to enforce it³²; the injustice of the exclusion of entire sectors of society from the shaping of legal norms, of public policy, and of our collective identity; and the injustice created by the lack of access to the arbiters of one’s substantive equality rights. Thus, one of the central issues which we address in the paper are the barriers “disadvantaged persons” face in accessing courts and other dispute resolution institutions and processes. The social, economic and political context of “disadvantaged persons” of course, shapes many of these barriers and thus attention to context is critical. These issues are discussed in Part II of the paper, “Accessing Law and the Legal System—the Barriers”.

Simply ensuring “access” to these important arenas—to the “justice system”—ought not, as our endorsement of the earlier quotation from Macdonald makes clear, to be equated with access to civil justice. Access to an arena where there is little or no chance that “justice” may be delivered, is hardly access worth having. Many, many factors influence whether once “in the door”, there is any prospect that justice may be delivered. We consider several issues in this context: models of disputing and their relationship to disadvantage (Part III); justice system personnel (Part IV); and advocacy services (Part V). In Part VI we address an important component of access to civil justice for disadvantaged groups; the opportunity to press systemic and group claims for equality and more broadly, to participate in the shaping of legal norms and public policy. Finally in Part VII we address separately the issue of access to civil justice for aboriginal persons.

While we focus primarily on courts and administrative tribunals in their functions of dispute resolution and the shaping of legal norms and public policy, throughout we also make reference to the importance of access to the constitutive and preventative uses of law. As David Luban notes,

...the selective exclusion of the poor from the legal system does not simply fail to confer an advantage on them—it actively injures them. For a legal system does more than protect people from each other: it enormously expands our field of action, allowing us to do things that we couldn’t have done otherwise—to draft wills, adopt children, make contracts, limit liability. As people utilize these features of the system, a network of practices—of power and privilege—set up from which

policy by way of lobbying, pressure groups or the submission of briefs to working groups, consultative committees and legislative hearings.” Macdonald, *supra* note 9 at 297.

³¹ It is important to look beyond the civil courts since, once criminal and family law are removed from the picture (as we have been told they are for this Review), the civil courts as dispute resolution sites of first instance are almost entirely irrelevant to what can reasonably be postulated as the (potentially legal) disputes of most concern to the most “disadvantaged people”.

³² There are a large number of remedial statutes which attempt to shift the balance of social and economic power, in order to redress some of the inequities of market outcomes. Paradoxically perhaps, frequently these entitlements are either unknown to the ostensible beneficiaries or there are no ready mechanisms for their enforcement. See our discussion of this in the text, *infra*.

those who have no access to the system are excluded; and this exclusion itself intensifies the pariah status of the poor.³³

To Luban's list we might also add that without resort to this function of law many persons are (and will remain) unaware of, and/or unable to access, rights and benefits granted by statute. For as noted earlier, statutory entitlements are frequently unknown to potential beneficiaries and/or not readily enforceable.

As the foregoing discussion no doubt makes clear the topic of "access to civil justice for disadvantaged groups" is enormous; addressing access to civil justice for the members of even one of the groups identified would be an enormous undertaking. What follows is thus of necessity a broad-brush approach to many of the issues, without the depth of nuance that our discussion of "disadvantage" suggests ought to be pursued, and without the benefit of a community-based consultation process. Hence, we believe that the implementation of our recommendations should be pursued in conjunction with further and more detailed consultations with affected groups.

Before proceeding we wish to challenge the dichotomy of objective and subjective barriers into which we were requested to fit our analysis. It has been argued by some commentators that there are two main forms of barrier: objective (costs, delay, the complexity of system, unintelligibility of legal texts, geographic isolation, physical inaccessibility, lack of adequate translation); and subjective (cultural background, perceptions of citizens, knowledge of one's rights).³⁴ The cost of litigation, for example, is frequently taken to be an objective barrier, its locus of origin residing in the system, rather than the individual. A distrust of the legal system, or fear of retaliation for invoking its processes are, in this schema, understood to be subjective barriers, located within the individual. But this dichotomization of objective and subjective, like all dichotomies, fails to direct our attention to the inter-relationship, indeed interdependency, between the (ostensible) polarities within the dichotomy. Are not costs subjective in the sense that they are only an impediment if one is not very well off? And is not one's distrust of the legal system objective in the sense that it is the past performance of that system which informs the distrust (it's something more than a whimsy, or a intuitive feeling). We raise this issue because how one categorizes these "barriers" has important consequences, both in terms of whether any remedial action is seen to be necessary and the form which that action might take. At least within dominant North American culture the "subjective" is taken to be personal, irrational, unfounded (not grounded in fact or reality) and unimportant. If mistrust of the system is characterized as subjective it is too easily discounted as unimportant; or to the extent that action is deemed necessary the correction applied is not to the system itself but to the "misperception" of the individual who harbours the mistrust. An example of this is found in *Access to Justice: The Report of the Justice Reform Committee*.³⁵ The authors of the report note that "[s]ome citizens of this Province have limited access to information and advice because: they live in remote or small communities; they are frail or physically disabled; or

³³ David Luban, *Lawyers and Justice* (Princeton: Princeton University Press, 1988) chapter 11, "Right to Legal Services" at 247.

³⁴ Roderick A. Macdonald, "A Study Paper -- Prospects for Civil Justice", Ontario Law Reform Commission, *supra* note 5 at 88-91.

³⁵ *Access to Justice: The Report of the Justice Reform Committee* (British Columbia: Ministry of the Attorney General, 1988)

they have trouble with the English language".³⁶ Why is the problem seen to reside in these individuals? Why is the limited access to information not attributable to the fact that information is largely unavailable in small communities, in physically accessible locations or in languages other than English or French? Or the unavailability of advice to the fact that there are relatively few lawyers who speak languages other than English or French, and to the monopoly on the provision of legal advice that the legal profession currently enjoys. If the problem is viewed in this latter light, the solution is not for potential recipients of advice to learn English, but rather the solution lies in the diversification of the legal profession and the loosening of the profession's monopoly on legal advice.

2. ACCESSING LAW AND THE LEGAL SYSTEM: THE BARRIERS

(a) LEGAL INFORMATION AND THE FORMATION OF LEGAL CONSCIOUSNESS

The lack of publicly available information about law (one's rights, entitlements, obligations, etc.) and about the workings of the justice system has been frequently cited as a barrier to access to justice. The lack of legal information impacts not only upon dispute resolution, but upon the role of law as enabler.³⁷ With respect to dispute resolution, William Felstiner et al. have observed that the process through which social events are transformed into legal claims is affected by a great many variables.³⁸ A critical variable is access to, and possession of, information. So, for instance, one needs information to name an injury, to blame another for its occurrence, to claim against the party responsible, and ultimately to transform that claim into a legal dispute. The informational needs are not only related to law, but legal information is frequently vital. At least a bare amount of information is necessary for one to know that an occurrence might be legally actionable, or that one has an entitlement to a state-funded benefit; without this the possibility of seeking legal redress or of demanding a benefit does not even enter one's consciousness.³⁹

It is important to note that the relation of lack of information to (in)justice cannot be reduced to the single dimensional equation: lack of knowledge of law = failure to realize the possibility that one's situation has a legal dimension. This implies that people are unaware of their ignorance, but often that is not the case. One of the most ubiquitous complaints made by disempowered people is they know that there are rules which govern their lives and determine their entitlements but they cannot ascertain what those rules are. Thus, they are forced to

³⁶ *Ibid* at 13.

³⁷ Joel Handler observes that the lack of knowledge of entitlements is pervasive and that information with respect to social welfare programs is not readily available to consumers. While his comments are in reference to the American experience, they also capture the Canadian experience -- see the discussion in the text, *infra*. Joel Handler, *The Conditions of Discretion* (New York: Russell Sage Foundation, 1986) at 30-32.

³⁸ William L.F. Felstiner, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming..." (1980-81), 15 *Law and Society* 631. Handler identifies several of these barriers: minority status, immigration status, education, language, and health problems. See Handler, *supra* note 37 at 29.

³⁹ In this section when we speak of "the law" and "the legal system" we are referring to the law and legal system of the dominant culture. While knowledge of law and the legal system is an important component of access to justice, this does not mean that decisions rendered in accordance with the values and norms promulgated by those laws and applied within this system lead necessarily to just results. This point has been amply demonstrated by many aboriginal authors, and indeed is one put rather forcefully by several proponents of A.D.R.

experience the actions of the state in their lives (whether for good or bad) as arbitrary and capricious, as they cannot place them in a framework of determining principles.⁴⁰ The point here is that these people know that they do not know and this knowledge is perhaps more isolating and disempowering than complete unawareness. It need hardly be added that in many cases there is nothing accidental about the lack of available information: the strategic deployment of ignorance is a quintessential strategy to maintain power imbalance and dependency. Thus, what follows about information production and dissemination must be read in a context in which the lack of information about legal entitlements is not a vacuum, but in many instances a constructed space.

In much of the literature it is the "complexity" of law and its language of expression which are identified as lying at the root of the problem, and the production of materials in "plain language" which is seen to be the solution.⁴¹ The *First Report* of the Civil Justice Review provides a clear example of this approach.⁴² While we agree that the lack of available information creates a significant barrier to justice⁴³, in our view the "plain language" response belies the underlying political nature of what is at issue. Knowledge production (including what is regarded as legitimate knowledge) and knowledge dissemination are manifestations of power.⁴⁴ Those who enjoy social power are frequently able to control knowledge production and dissemination, and to use this control as a mechanism to reinforce their position of power and domination. This is as true for law, as for any other body of knowledge.⁴⁵ Because knowledge is so closely connected to power, it should come as no surprise that oppressed groups frequently see it as a terrain or site for struggle. In the context of this Review this means that the question of who ought to produce and disseminate information about law is critically important.

The government's role in producing and disseminating information about laws governing "private" disputes where it has no immediate interest in shaping the information to support its

⁴⁰ For example, this point was made repeatedly in consultations with social assistance recipients for the ill-fated social assistance reform initiative, first for the Social Assistance Review Committee and later for the Minister's Advisory Group on New Social Assistance Legislation: Ontario, *Report of the Social Assistance Review Committee: Transitions* (Toronto: Queen's Printer, 1988); Ontario, *Advisory Group on New Social Assistance Legislation: Consumer Focus Group Report* (Toronto: Queen's Printer for Ontario, 1992).

⁴¹ For example, *Access to Justice: The Report of the Justice Reform Committee*, *supra* note 35 recommended a major plain language initiative. Such an initiative, so the review foretold, would make "justice more relevant, efficient, accessible and less costly" (at 6). Precisely how "plain language" would accomplish this is less than clear.

⁴² *First Report*, *supra* note 11 at 39-40, 384-7

⁴³ Andrew Roman refers to a Environic survey which found that almost 9 Canadians in 10 feel insecure about their knowledge of the Canadian system of justice. See Roman, *supra* note 9 at 193.

The inaccessibility of law was identified during the consultation process as a barrier to access. The anti-poverty group identified consumer law as particularly complex and inaccessible. The disability group noted the particular challenges for people with literacy or learning problems (a point we address *infra* in the text). Many persons with disabilities, they noted, have difficulty finding information and advice to apprise them of their rights.

⁴⁴ For further elucidation of this point see, for example, Elizabeth Minnich, *Transforming Knowledge* (Philadelphia: Temple University Press, 1990); Linda Nicholson (ed.), *Feminism/Postmodernism* (New York: Routledge, 1990).

⁴⁵ There is an extensive literature on this, see for example, Dorothy Smith, *The Conceptual Practices of Power: A Feminist Sociology of Power* (Toronto: University of Toronto Press, 1990).

own interests, will be for many, but not all, largely uncontroversial. However, information produced and disseminated with respect to those matters where the government has a direct interest in not sharing full and accurate information is another matter. That direct interest on the government's part may lead to the creation and dissemination of less than accurate information is born out in practice. For example, some information sheets about government entitlements are actively misleading. Those who work in the area know that disputes over the content of information based on government agendas for information dissemination are common.⁴⁶ The more complicated and incomprehensible the actual "law" is, the more scope there is to manipulate information. Social welfare legislation is particularly poorly drafted; Mr. Justice Archie Campbell once described the regulations to the *General Welfare Assistance Act* as "Kafkaesque" and "a lawyer's nightmare".⁴⁷

William Simon's observations with respect to why legislators willing to create substantive welfare rights should not be trusted to create adequate procedures to enforce them are also apt with respect to the production and dissemination of information,

[t]hey might hope to take the wind out of the sails of a movement for welfare rights by providing them substantively, while tacitly or covertly undercutting or nullifying them with ineffective enforcement. Or they may want to facilitate tacitly an allocation of benefits for which they could not win adequate support if provided explicitly. Or perhaps the legislature has been "captured" by an entrenched bureaucracy that wants to control the program in its own interests rather than in those of its putative beneficiaries. The history of American welfare legislation contains many examples of such abuses.⁴⁸

Tied in with the question of who ought to have control over the production and dissemination of legal knowledge is the issue of the purpose of the dissemination: is the purpose simply to provide information (as though the "information" is uncontested and uncontestable); or to provide material which contests dominant discourses, interpretations, etc.? Is the goal to prop up the legitimacy of the existing order or to empower "disadvantaged individuals and groups", through the nurturing of their capacity for critical reflection about the "justness" of the law, to challenge that order?

The "plain language" rhetoric problematically presupposes that there is no contest over what it is that ought to be communicated; the problem is simply to put that information into "plain language". But even if we accept that the goal of knowledge production and dissemination ought to be the transmission of information, it is in fact not at all obvious what the most pressing informational needs of different groups are. This too is connected to the question of who ought to be in control—who should determine what those needs are and how those needs ought to be satisfied?⁴⁹

⁴⁶ Community legal clinics once spent years trying to get the Ministry of Community and Social Services to agree to posting a simple one page statement of clients' "rights" in Family Benefits offices. Among its various objections to the clinic's proposal was the fact that the poster stated that clients had the right not to be discriminated against on grounds taken verbatim from the *Ontario Human Rights Code*.

⁴⁷ *Kerr v. Metropolitan Toronto* (1991), 4 O.R. (3d) 430 at 446.

⁴⁸ William H. Simon, "The Rule of Law and the Two Realms of Welfare Administration" (1990), 56 *Brooklyn Law Review* 777 at 779.

⁴⁹ As Nancy Fraser and Michael Ignatieff both note, what it is that the poor "need" is frequently, and problematically, taken for granted. Fraser argues that the legitimization of particular needs claims, the interpretation

This issue has been identified in several reports prepared for the federal Department of Justice as part of its multiculturalism initiatives.⁵⁰ Etherington, in a review of these reports, observes that a recurring theme is the need to make more culturally sensitive public legal education accessible to members of minority communities.⁵¹ These reports also argue that to accomplish this, these initiatives must be developed by, or in consultation with, members of cultural communities to ensure that what it produced is responsive to their problems and their self-identified needs.⁵²

These reports also make the observation that many members of minority communities rely heavily on government social service agencies and non-governmental social service organizations for legal information or referrals to legal information services, and hence argue for the importance of involving these agencies in the development of material.⁵³ Another identified theme relevant to access to justice is the importance of an active, rather than passive, process of community legal education. Many people, particularly those who are the most disadvantaged, will not seek out information, either because they have not even identified a need for information, or have too few resources to pursue it, and hence an active approach (outreach) is critical.

An innovative methodology for the development of culturally relevant information is found in the British Columbia Law Courts Education Society's comparative justice systems project.⁵⁴

of these needs, and their implementation are all highly politicized matters -- not "givens" to be assumed. As such, the participation of members of "disadvantaged groups" in forums and processes wherein needs discourse is generated, and particular needs legitimated, interpreted and implemented, is critical. See Fraser, *supra* note 6 and Michael Ignatieff, *The Needs of Strangers* (New York: Viking Press, 1985).

⁵⁰ See Brian Etherington, "Review of Multiculturalism and Justice Issues: A Framework for Addressing Reform" (Ottawa: Department of Justice, May 1994) Working Document WD 1994-8e.

⁵¹ Similarly, Samuel Stevens identifies the importance of materials developed by and for aboriginal communities. See Samuel Stevens, "Access to Civil Justice for Aboriginal Peoples" in Hutchinson (ed.), *supra* note 9, 203.

⁵² Etherington, *supra* note 50 at 101. This presupposes a homogeneous community with shared interests, needs, etc. But as Etherington observes elsewhere in the report, within any given cultural community there are also struggles over the control of knowledge. He observes that "... several reports express concern that cultural differences can impede access to justice by preventing minority group members, particularly women and children, from learning of their legal rights and entitlements, or from approaching system actors (including lawyers) to seek to enforce their rights. Such problems can be worse for minorities who are under-represented among justice and social service personnel who, in turn, are unfamiliar with the customs and values of the minority cultural communities", (at 86-87).

⁵³ *Ibid* at 103. The important role of non-governmental agencies and grassroots organizations in providing legal information and assistance, as well as advocacy, was also identified in the consultation process and recognized by the Ontario Human Rights Review Task Force in its report, *Achieving Equality: A Report on Human Rights Reform* (hereafter the "Cornish Report") (Toronto: Ministry of Citizenship, 1992). It recommended that organizations presently providing lay human rights advocacy be able to apply to become "Equality Rights Centres" (community-based advocacy centres, which would be regionally located throughout the province). In discussing this recommendation the task force noted that such groups are "better able to reach out and provide services to groups who are particularly fearful or unaccustomed to approaching usual services", (at 58).

⁵⁴ Court of Queen's Bench Education Seminar 1994, Comparative Justice Systems Project, Law Courts Education Society of BC, Project Report, Sept. 1994. We do not mean to suggest by our discussion of this project that it ought to be replicated in the precise manner as undertaken in British Columbia. Without speaking directly with the participants it is hard to know if the community consultation was adequate and whether the ultimate product was satisfactory. Moreover, as designed, the project clearly emphasized the criminal justice system.

The objective of the project was to develop a "multifaceted legal education program on the structure and operation of the justice system with selected communities [large immigrant populations] in British Columbia". Starting from the recognition that those new to country have experiences and understandings from their home countries which colour their understandings of the Canadian legal system, they worked with the identified communities to identify the cultural "gaps" in understanding and to develop culturally appropriate information and programming. In other words, they worked from "the experiences and knowledge base of these communities".⁵⁵ Methodologically, they accomplished this through a community advisory team, key informant interviews and focus groups.⁵⁶ From this research they developed programs tailored to the needs of newcomers in the Chinese, Indo-Chinese, Latin American, Vietnamese, Iranian, Polish and Arab communities. In the second phase of the project, which was just getting under way at the time the report was written, the project organizers planned to work with settlement agencies and with service providers in the court system; with the former to improve their understandings of the workings of the justice system so that they could better aid newcomers⁵⁷, and with the latter so that they would be in a position to respond appropriately in their interactions with persons from the non-dominant culture.

A further issue which the "plain language" response fails to address is that of illiteracy. Mark Drumbl provides an overview of existing data which gives some sense of the gravity of the problem: "4.5 million Canadians (one adult out of four) could neither read nor write at a level that allowed them to feel comfortable with many of the responsibilities imposed by the marketplace and society"⁵⁸; "16% are functionally illiterate and a further 22%, although

⁵⁵ *Ibid* at 5.

⁵⁶ A brief review of the research findings pertaining to the Chinese community is instructive: the justice system is to be avoided whenever possible; there is fear of the system; many do not understand problems have a legal component; many do not know where to go for help; many do not have easy access to legal information; many do not act to enforce their rights; there is a lack of trust; there is not enough translation in courts; there are insufficient lawyers who understand Chinese. Recurring themes across the various communities included: fear; avoidance; preference to resolve disputes within the family and the community; lack of information; interpreter problems; lack of knowledge with respect to rights; feel too threatened to act on them; lawyers as inaccessible - only for rich, take advantage of clients, do not speak their language.

⁵⁷ It was estimated that in the Greater Vancouver area up to 75% of client inquiries to settlement and immigration agencies concern matters that have some legal component, (*ibid* at 22). The report identified the need to train interpreters working in these agencies to understand the values represented by Canadian legal and justice systems; as well as the needs for the training of staff in these agencies on an on-going basis and for the development of a system for the continuous flow of information to those agencies.

It is also important to bear in mind that the census Toronto region is the single largest destination point for immigrants to Canada (approximately 30% of all immigrants to Canada). Almost three quarters are members of visible minority groups. Close to half (44%) of all immigrants to Canada between 1991 and 1993 spoke neither official language. Toronto in the last ten years has become one of the most multinational cities in the world: Citizenship and Immigration Canada, *Facts and Figures: Overview of Immigration* (Canada: 1994).

⁵⁸ Mark A. Drumbl, "Illiteracy, Disempowerment and Justice: How the Ontario Human Rights Code Protects Persons with Low Literacy Skills" (1993), 4 Windsor Review of Legal and Social Issues 107 at 109, citing a 1987 Southam News survey.

having some literacy capabilities, tend to avoid situations requiring reading.”⁵⁹ As Drumbl notes, “within Canada, high levels of illiteracy are predominantly found among those groups that have been traditionally disempowered: native peoples, visible minorities, the physically or mentally challenged, non-citizens, the elderly and francophones outside Quebec.”⁶⁰

Functional illiteracy has obvious implications for access to justice: an inability to read or to complete complex claims forms for social benefits may result in the failure to claim benefits to which one is entitled; the inability to read even “plain language” publications will mean that those who are functionally illiterate have even less information and knowledge about their legal rights and entitlements than literate members of society; and “[t]he humiliation of having to admit one’s illiteracy before a court of law may induce that individual to settle the issue beforehand on unfavourable terms”⁶¹. In addition to these impediments to righting a wrong or claiming entitlements is the reality that persons who are functionally illiterate are more likely to be taken advantage of (intentionally or not), particularly in commercial or consumer transactions. As Harry Arthurs suggested in his comment on Roderick Macdonald’s background paper for the Civil Justice Review, perhaps “more civil justice might be achieved for a broader spectrum of citizens, per dollar spent, by increasing adult literacy, and public information about law and justice, rather than by appointing more judges or funding more *Charter* challenges”.⁶²

The plain language approach also fails to take into account the necessity of providing information in a variety of media to meet the needs of those with various disabilities. David Lepofsky, in commenting on the failure of courts to make printed materials available to print-handicapped individuals, makes also the broader point that,

...[w]hile freedom of information laws have extended to the public a right of access to public information in government hands, governments have generally not set up comprehensive systems for ensuring timely access to information for visually handicapped and otherwise print-handicapped persons in alternative formats, even though the cost and time needed to produce such alternative formats has been dramatically reduced in recent years.⁶³

Recommendations

1. We agree with the *First Report* that information about the law and legal system is an important element of access to civil justice. However, it is important that the issues of deciding what information should be created, the form and content of the information products and the modes of dissemination of information all be carried out in cooperation with community-based groups, and non-governmental agencies specializing in public legal

⁵⁹ *Ibid* at 109-110, citing a 1989 Statistics Canada survey. It has been estimated that up to 70% of social assistance recipients lack literacy at the grade 12 level; John Stapleton, Manager of Operational Policy, Social Assistance Programs Branch, M.C.S.S. *Report on Social Assistance Programs in Ontario* (April, 1994).

⁶⁰ *Ibid* at 120 or 123.

⁶¹ *bid* at 124.

⁶² Harry Arthurs, “Comment on “Prospects for Civil Justice””, Ontario Law Reform Commission, *supra* note 5 at 181.

⁶³ David Lepofsky, “Equal Access to Canada’s Judicial System for Persons with Disabilities, A Time for Reform”, unpublished paper on file with the Ontario Law Reform Commission, at 11.

education (an example of such an organization is Community Legal Education Ontario (C.L.E.O.), a community controlled non-profit organization funded by the Ontario Legal Aid Plan which specializes in public legal information directed at low income individuals and groups.)

2. Particularly for legal information directed at "disadvantaged groups", it is important that information be developed in consultation with representative organizations (such as ethno-cultural organizations, literacy organizations, disability organizations, etc.) at all stages of the information creation and dissemination process. In most cases it will be preferable that primary control of the legal information process be located outside government (although government would remain responsible for funding public legal information).

(b) DEPENDENCY AND VULNERABILITY

As noted, the most "disadvantaged people" in Ontario are also people whose lives are closely articulated into the bureaucratic programs and institutions of the welfare state. Disadvantage and poverty are integrally connected, and poor people are much more likely to rely on government income support, on-going social services, and so on, and for longer periods of time. Many people are in an on-going relationship with various government bureaucracies for much of their lives. Both the fact of these relationships and the behaviours of the personnel who control their access to benefits and services affect how people respond to problems and disputes, even when they know that there is potentially a legal dimension to the dispute.

Dependency upon the state, within a cultural context that values independence (primarily economic) and which increasingly blames individuals for their dependency, may create, not surprisingly, feelings of inadequacy, apathy, helplessness, and feelings (often justified) that pursuit of a remedy is more trouble than it is worth. The phenomenon of self-blame is widespread and reinforced not only by the bureaucracies with whom persons dependent upon the state interact, but by society more generally (and increasingly, as noted earlier). Those who blame themselves may have no conception of themselves as rights-bearers entitled to make claims against the state. They may not apply at all for benefits, and if they do, may accept the outcome, whatever it is.⁶⁴

Moreover, as Joel Handler notes, even if one has a sense of oneself as a rights-holder one may not be prepared to challenge bureaucratic decision-makers, or indeed even press for full information about a program or program entitlements. As he notes, many people are "worried about surviving, and getting into the program", not about "legal rights, or the finer aspects of entitlements".⁶⁵ Challenges also carry with them the potential for retaliation and thus enormous risk given the dependency of the challenger. As Andrew Roman notes, "the reality when one is totally dependent for one's livelihood on the goodwill of a large bureaucracy that can

⁶⁴ During the consultation process representatives of various disability groups observed that many persons with disabilities, particularly if unemployed, have a sense that they cannot challenge institutions and large corporations. They also noted that a common and significant psychological feature of disability is a general sense of hopelessness and frustration, which makes it all the more difficult to initiate action on one's own behalf; many may not feel they should assert what are really their rights.

⁶⁵ Handler, *supra* note 37 at 31.

retaliate viciously if attacked" is that victims [of bureaucratic error or wrongdoing] are reluctant to complain.⁶⁶

When dependency is coupled with the reality of the "bureaucratic defiance of the law", (the tendency of public and private entities with no pressures to accountability to operate in accordance with their own bureaucratic imperatives and with disregard for legal standards)⁶⁷, two outcomes are entirely predictable: widespread failure to conform to law; and the subtle and unsubtle harassment and intimidation of "disadvantaged people". With respect to this latter outcome, the harassment and intimidation are both endemic and virtually invisible. As with police behaviour towards racial minorities, homeless people and other "undesirables", these issues are ignored, denied or in the rare instance that they are proved beyond question, attributed to the one or two "bad apples" (although it seems that the barrel is never sorted even when the rotten fruit is identified). These problems are integral to the social welfare programs which target the most "disadvantaged" and where there are no or few countervailing political or legal pressures. There is indeed a strong argument that they, like the "information vacuum" described earlier, are functional for these programs and not just incidental to lack of controls.⁶⁸

People who are subjected to these threats often forgo any attempts to obtain legal remedies. Those who get to legal advice after or before such a threat are more likely to pursue remedies (but even then many will not because of a fear of retaliation), but these are only a small percentage of the people affected. Many are intimidated from the outset and never seek legal advice.

Even people who do pursue a legal remedy in respect of a disputed entitlement are very unlikely to pursue a remedy in respect of the abuse itself, although there are some exceptions. Advocates may either advise people that there is no legal remedy for the behaviour or that they have no chance of achieving justice through the civil justice system anyway. Despite years of client demands, most of these regimes have no effective accountability mechanisms and the likelihood of serious retaliation is quite high.⁶⁹ The role of legal services and advocates in determining how to respond to these issues is very important, as will be the attitudes of judges who deal with issues aimed at systemic administration.

⁶⁶ Roman, *supra* note 9 at 190.

⁶⁷ *Ibid* at 188ff.

⁶⁸ See generally J.Struthers, *The Limits of Affluence* (Toronto: University of Toronto Press, 1994); M. Little, "No Car, No Radio, No Liquor Permit: The Moral Regulation of Single Mothers in Ontario 1920-93 (Doctoral Dissertation, York University, 1994); M. Little "Manhunts and Bingo Blabs"(1994), 19 Canadian Journal of Sociology 233.

⁶⁹ The fear of reprisal noted by American writers such as Handler is confirmed by the experiences of advocates for low income people in Ontario. Legal advocates rarely take action against many kinds of abuse because of client reluctance and fear of retaliation. One legal clinic in Ontario recently painstakingly documented routine abuses of power and intimidation of clients by social services Eligibility Review Officers, and used them as the basis for a formal complaint. They also have commenced a civil action against the Municipality. Their efforts (including litigation) appear to have substantially improved the behaviour of the social services employees but the likelihood of a sanction or recompense for earlier victims seems slim at best.

Many of the remedies for this lie outside the capacities of the legal system and depend on good faith administration, internal accountability mechanisms and program design.⁷⁰ However, access to advocacy services is probably more important than anything else in guarding against attempts to circumvent legality. (See discussion of advocacy services *infra*).

Recommendations

3. Existing mechanisms of internal accountability within government bureaucracies responsible for programs and services should be reviewed and new mechanisms put in place to better curb illegality, bad faith administration, threats and retaliation. Consideration should be given to whether and how individual public servants should be held accountable. A complaints and sanctions process operating within an administrative scheme must be made known to clients, and there must be guarantees of confidentiality and non-retaliation, otherwise any other changes will be meaningless.
4. Advocacy services to challenge bad faith administration, harassment and illegality must be in place and must be adequately funded.

(c) COSTS

There is little that needs to be said here as the prohibitive cost of accessing the courts, and the legal system or legal advice more generally, is well known.⁷¹ Several issues related to costs, however, warrant some discussion. The first of these is the common misconception that the rich and the poor (because of legal aid) are able to litigate and that it is the middle class which has no access to the courts.⁷² The erroneous nature of this claim is easily demonstrated.⁷³ The financial eligibility criteria for legal aid are such that one has to be very poor in order to qualify, and are about to drop dramatically, so that large numbers of poor people who now qualify will no longer be eligible. This leaves a huge sector of working class persons who are not eligible for legal aid and who, by comparison to even the middle class, have relatively few resources to litigate. Furthermore, the issuance of certificates for civil matters is solely within the discretion of area directors of legal aid. Civil certificates include not only general civil litigation, but also family law and administrative law. Of the civil certificates issued the vast majority are for family law, and coverage for other civil matters is

⁷⁰ Roman suggests that individual civil servants be held responsible if they knew or ought to have known that the action was contrary to law by requiring that they pay the costs personally, and that they be subject to discipline. See Roman, *supra* note 9 at 190.

⁷¹ Indeed, during the consultation process the sentiment was expressed that the courts are for the rich only.

⁷² The *Report of the Ontario Courts Inquiry* ("the Zuber Inquiry") (Toronto: Ministry of the Attorney General, 1987) for example, stated that "[i]t is generally conceded that only the very wealthy, or the poor on legal aid, can afford to go to court". The *First Report*, *supra* note 11 at 130, states that, "[t]here is a particular concern that the middle class, who do not qualify for Legal Aid, cannot afford the costs of litigation and therefore encounter a barrier to access to justice."

⁷³ Roman also takes the position that the argument that the poor are now well represented by legal aid and that only the middle class is excluded is untenable. See Roman, *supra* note 9 at 183.

steadily being restricted.⁷⁴ Indeed, few certificates are issued for general civil litigation.⁷⁵ Thus the claim advanced in the *First Report* that legal aid is a significant factor in increasing litigation and in the protraction of litigation is as untenable as the claim that the poor are well-served on legal aid, (see the discussion *infra* of advocacy services.)⁷⁶

It is also important to note that with the retreat of the welfare state, and the increasing depth and duration of poverty, fewer and fewer persons will be able to afford any form of legal services. Thus, any reductions in the costs of accessing legal services or accessing the courts will have to be dramatic if they are to have any impact.

A further issue is the need to consider the question of costs from the particular vantage point of various "disadvantaged groups". Discussions of costs usually address only those directly associated with the legal system: lawyers' fees; filing costs; the costs of transcripts; etc. The many other costs associated with participation in institutionalized dispute resolution are frequently ignored: lost time from work⁷⁷; monies paid for travel, particularly for those who live in remote locations; monies paid for childcare; etc. For many "disadvantaged persons", without money to cover these expenses up front, there is no prospect of participation in formal dispute resolution processes. A single mother with three pre-school aged children on welfare is simply in no position to pay for the childcare necessary to, for example, permit her participation in a three day trial, or a full day S.A.R.B. hearing.⁷⁸ For those who live in remote locations, the costs of travel and accommodation is frequently prohibitive.⁷⁹

While costs are without a doubt a significant, and indeed frequently insurmountable, barrier to accessing the courts, it does not follow from this observed reality that "alternatives" to courts are necessarily inexpensive. As far as we are aware, there is no empirical literature which establishes any necessary cost saving to the disputants (indeed A.D.R. may render the proceedings more expensive if it becomes an additional and necessary pre-condition to accessing a decision-maker).⁸⁰ Similarly, the claim is often made that adjudication by administrative decision-makers comes at a substantial cost savings for the disputants and the public. However, as many others have noted, the increased judicialization of the processes of

⁷⁴ As of October, 1994, legal aid coverage for all personal injury actions (motor vehicle, slip and fall, medical malpractice, etc.) was virtually eliminated. It is generally accepted that "poverty law" certificates are in jeopardy. See the discussion of advocacy services, *infra*.

⁷⁵ Legal aid certificate funding in 1994-5 included \$118,654,000. on criminal certificates, \$95,113,000. on family law certificates, and \$29,512,000. on immigration and refugee certifications. The lowest area of spending was on "other" civil certificates, at \$20,153,800., which included not only tort, contract and consumer matters in the Ontario Court but also all administrative and "poverty law" certificates (landlord/tenant, social assistance, workers' compensation, etc.).

⁷⁶ *First Report*, *supra* note 11 at 130.

⁷⁷ The costs of time lost from work was noted by those participating in the consultation with Anti-Poverty Groups.

⁷⁸ Costs of participation are sometimes expressly dealt with in the case of administrative tribunals (although in all cases only partially): eg., see *Ministry of Community and Social Services Act* R.S.O. 1990 c.M-20 s.12(7).

⁷⁹ See the Canadian Bar Association Legal Aid Committee, *Access to Justice: An Inquiry into Legal Aid in Ontario* (Ontario: Canadian Bar Association, 1986); and Samuel Stevens, *supra* note 51.

⁸⁰ Owen Fiss, "A Solution in Search of a Problem" and Deborah Hensler, "Comment on "Prospects for Civil Justice"", both in Ontario Law Reform Commission, *supra* note 7, also note that there is no evidence of cost savings; at 206 & 237 respectively.

administrative tribunals and the concomitant necessity to engage a lawyer has meant that administrative justice also carries a hefty price tag.

The final point to be made flows from the fact that the single largest component of "expensive" processes is lawyers' fees. While we think there are many other good arguments for the loosening of the legal profession's monopoly on the provision of legal services (see the discussion of advocacy services *infra*), the impact this would have on the costs of legal services is significant.

Recommendations

5. There should be established mechanisms for the coverage up-front of particular costs associated with the formal pursuit of a legal claim, through the Legal Aid Plan and through amendments to the enabling statutes or regulations for those "tribunals of everyday life" which do not currently provide for the coverage of such costs.
6. While we concur with the recommendation of the *First Report* that a working group be established in conjunction with the Law Society of Upper Canada, for the purpose of addressing the question of legal fees and making recommendations for the Final Report (Recommendation 6), we would take this further. Statutory amendments are required loosening the legal profession's monopoly on the provision of legal services as a means both to reduce the costs of legal services and as discussed, *infra* to improve the quality of those services.

(d) DELAY

While it is true in many circumstances that "justice delayed is justice denied", it is also true that the impact of delay varies considerably depending upon the nature of the matters in issue, as well as the socio-economic position of the parties. Where one's physical or mental well-being is threatened and there is the potential to remove that threat through recourse to law, delay contributes to the materialization of harms which could potentially have been avoided. Consider, for example, the situation of a single mother who has applied for and been denied family benefits. She has no income and herself and children to shelter, feed, clothe and nurture. The denial of benefits threatens the physical and mental well-being of herself and her children. Let us also assume that there is a good legal argument to challenge the denial, so that there is the potential to remove the threat which her family faces. The longer the delay in accessing legal services and an institutionalized decision-maker, the more likely it is that the threat against the family will materialize; that is, the more likely it is that their physical and mental well-being will be impaired. If the delay goes on too long, they will be irreparably harmed. Part of what is morally troubling about this situation is that persons unable to support themselves should be abandoned in any circumstances in a society as affluent as ours. But it is also deeply troubling that the family in our example has, at least arguably, a legal entitlement to state benefits but an entitlement which is meaningless if the claim to it cannot be advanced and determined expeditiously.

Additionally, the longer the period of delay the greater the opportunity for the harassment of, or retaliation against, a complainant and those seen to be sympathetic to the complainant's grievance; and thus the greater likelihood that the particular claim will be abandoned and others, never made. Even where no retaliation occurs, an outstanding complaint can generate a

very tense environment, and the longer the matter remains unresolved, the more difficult the environment may become.⁸¹ This is particularly true in the context of employment, but arises in other contexts where there is an on-going relationship characterized by inequalities of power (social assistance recipients and tenants are two other groups subject to this kind of exploitation).

For the elderly, dispute resolution may be urgent in two senses. First, many of the issues which the elderly face are urgent in that immediate attention and redress are necessary to avoid harm (the sort of urgency discussed above). But a second sort of urgency is created by the reality of the pending end of one's life. For these reasons many advocates for the elderly negotiate rather than litigate.⁸²

Recommendations

7. For decision-making bodies who hear cases of a variety of sorts, a system should be established to prioritize cases based upon the principle of harm discussed above. Where the caseload of a decision-making body is largely made up of cases which ought to be heard promptly, because of the harms brought about by delay, resources and structures must be in place to ensure that they are. We recognize that the causes of delay are multiple and complex and hence, that investigation of the causes of delay must necessarily precede the re-ordering of the operations of decision-making bodies in accordance with the harm principle.

(e) PHYSICAL BARRIERS

While many, if not most, of the institutional sites for a variety of forums and forms of dispute resolution are far from barrier-free, courthouses are frequently the worst offenders. As one author has noted "... courthouses throughout history have been designed with an image of strength and dignity. Reverence for the law is often reflected in large columns, heavy doors, many steps, and other features that might impede accessibility. Second, people sometimes approach the courthouse with hesitation, anyway. Encounters with the law may seem frightening, and the intricate judicial system bewildering. Architectural barriers may add to already troublesome psychological barriers, precluding even an attempt at redress of grievances."⁸³

⁸¹ This phenomenon was well documented by the Cornish Report, *supra* note 53 at 21, 92-93 in the context of human rights complaints. See our discussion *supra* in the text regarding retaliation and intimidation in the context of the receipt of government benefits.

⁸² Representatives of the Advocacy Centre for the Elderly indicated this during the Consultations. The literature on advocacy for the elderly also highlights the importance of prompt resolution and thus the need to look to processes which deliver this. See Marilyn Park et al., "Developing a Legal Services Program Policy on Alternative Dispute Resolution: Important Considerations for Older Clients and Clients with Disabilities", [1992] Clearinghouse Review 635.

⁸³ Erica F. Wood, "Toward a Barrier-Free Courthouse: Equal Access to Justice for Persons with Physical Disabilities", [1990] Clearinghouse Review 557 at 557. Wood notes that a planned supplement to *The American Courthouse*, a joint undertaking of the American Bar Association and American Institute of Architects, will include specific recommendations on barrier-free courthouse design, (at 559). Lepofsky, *supra* note 63 at 17 argues that facilities ought to conform to the standards for state of the art barrier-free design and suggests that such information can be obtained by contacting disability services agencies.

As David Lepofsky points out the barriers are numerous—the steps in the front of a courthouse, the steps up to the Judge's bench or to the witness stand or jury box, the location and design of the washrooms—and impede the full participation of the mobility impaired and those with low vision or no vision.⁸⁴ The “victims”, to coin Lepofsky's terminology, of these architectural impediments are not only the parties to a proceeding, but witnesses, prospective jurors, judges, court staff, lawyers and members of the public.⁸⁵

Recommendations

8. Consultations with disability services agencies should be undertaken to determine standards for state of the art barrier-free design. All buildings wherein institutionalized dispute resolution is housed ought to conform to such standards.

(f) LANGUAGE BARRIERS

As was repeatedly noted during the consultation process, for a great many “disadvantaged persons”, access to law and legal services is impeded by language barriers and the lack of meaningful translation supports to address those barriers. As discussed *infra*, the legal profession does not begin to reflect the diversity of the community its members are to serve, and this means that many persons are unable—even if they have the resources—to retain a lawyer who is able to communicate with them in their first language. Moreover, translation services are often unavailable and if available, frequently inadequate and almost invariably expensive. While having a friend or relative translate is satisfactory in some circumstances, other circumstances, for example the preparation for a hearing and the presentation of evidence, require professional translation to ensure accurate translation, an understanding of legal terminology, and an understanding of cultural context. With respect to this latter point, the importance of “cultural interpretation” cannot be over-emphasized; direct translation of words and phrases often fails to accurately communicate the speaker's meaning, since words and phrases frequently take on different meanings in different cultural contexts.

Of course, translation is not only an issue with respect to accessing legal advice, but also with respect to meaningful participation in institutionalized dispute resolution forums. Meaningful participation (a concept elaborated upon in the next section) requires that one understands the process, and the various inputs into that process (for example, oral and documentary evidence). Thus, translation is required not only for the presentation of the disputant's evidence but throughout the process, and applies to all manner of “communications” tendered. As Lepofsky suggests with respect to the hearing process, this requires that persons with hearing disabilities “have readily available sign language interpretation or real-time transcription”.⁸⁶

⁸⁴ Lepofsky, *supra* note 63 at 9.

⁸⁵ *Ibid* at 9; and Wood et al., *supra* note 83 at 557. The *First Report*, *supra* note 11 at 373-76 refers to a March, 1994 Coopers and Lybrand study of the Toronto Courts which identified, amongst other drawbacks in courthouse facilities in Metro Toronto, “lack of features for handicapped accessibility”. In its 4 page discussion of court facilities this is the only notation of accessibility problems for persons with disabilities, and the issue is not canvassed at all in its discussion of requirements for court facilities.

⁸⁶ Lepofsky, *supra* note 63 at 10.

Recommendations

9. Together with community-based organizations, the specific needs for translation services should be identified and a model for best meeting those needs developed.
10. The translation services developed ought to be funded by the provincial government.

3. MODELS OF DISPUTING AND THEIR RELATION TO DISADVANTAGE

The predominant process within public dispute resolution forums (courts and administrative agencies) is adversarial adjudication. While the term "adjudication" is used to describe a cluster of processes, most commentators agree on a particular constellation of core characteristics: an independent and impartial third party decision-maker renders a binding decision after considering proofs and arguments. Within Canada, adjudication is almost invariably associated with an adversarial presentation in which it is the responsibility of the parties to investigate and to present proofs and arguments to the decision-maker, (this is often referred to as the principle of party prosecution), the decision-maker remains passive and open to persuasion⁸⁷, and each party is given the opportunity to contest or challenge the proofs and arguments presented by others.⁸⁸

It is this model of adjudication against which courts have assessed the processes of administrative tribunals under the banners of "natural justice", and more recently "fairness". While grossly over-simplifying a complex area of law, in essence the courts have insisted—absent clear legislative expression to the contrary—that where tribunals exercise functions similar to those exercised by courts, a similar process must be followed.⁸⁹ More recently, the ability of provincial legislatures or Parliament to prescribe administrative procedures which fail to meet the requirements of "natural justice" or "fairness" has been limited by section 7 of the *Charter* for a narrow range of cases: those related to "life, liberty and security of the person". While acknowledging that "fundamental justice" may not in all such cases require a full hearing, the decision of the Supreme Court of Canada in *Re Singh* suggests that such circumstances will be exceptional.⁹⁰ In sum, what we see in judicial decisions are

⁸⁷ Neil Brooks, "The Judge and the Adversary System" in Allen M. Linden (ed.), *The Canadian Judiciary* (Toronto: Osgoode Hall Law School, 1976) 89; and Robert R. Reid and Richard E. Holland, *Advocacy: Views From the Bench* (Aurora: Canada Law Book, 1984).

⁸⁸ For some authors, like Lon Fuller, party participation is the defining characteristic of adjudication itself; see Lon Fuller, "The Forms and Limits of Adjudication" (1978), 92 *Harvard Law Review* 353. This may be true for particular cultural settings, but is not true of those jurisdictions with inquisitorial-based adjudication.

⁸⁹ This is so notwithstanding a rejection of an earlier approach in which the classification of function was determinative of the outcome. Under that approach, if the function was classified as judicial the requirements of natural justice were required to be observed, absent clear legislative expression to the contrary. None of the components of natural justice were required if the function was classified as administrative. The current approach is to assess what fairness requires in the circumstances. But in this approach, if the decision to be made resembles those made by courts, fairness is likely to require procedures very similar to those of courts.

⁹⁰ *Re Singh v. Minister of Employment and Immigration* (1985), 17 D.L.R. (4th) 422 (S.C.C.).

conceptualizations of fairness and justice which are deeply enmeshed with adversarial adjudication, or a "due process" hearing⁹¹.

It is worthwhile considering the theory which weaves adversarial adjudication together with fairness and justice. The theory turns upon two critical assumptions: that adversarial adjudication, through its guarantee of party participation, enhances the accuracy of decision-making and the dignity of participants; and that accuracy and dignity are two critical components of justice or fairness. If we work backwards from the outcome, the theory maintains that an outcome is more likely to be just if based upon an accurate reconstruction of facts, and an accurate reconstruction of the facts requires the participation of all interested parties. An additional element here relates to the adversarial form of the presentation, which understands human nature as motivated by self-interest and competition and thus assumes that parties charged with the responsibility to prepare their own cases and challenge that of their opponent(s) will best approximate the "truth" of the factual matters in issue.⁹² While there are many critiques of the assumptions underpinning adversarial presentation (equality of resources being a critical one)⁹³, what we want to highlight here is that the failure to hear from interested parties can seriously undermine the accuracy of the fact-finding. Examples of this in the context of the administration of welfare benefits abound.⁹⁴

The dignity argument postulates that a fair and just decision can only be reached through the active participation of those who will be directly affected by that decision. To decide an issue which will significantly impact upon a person's life without providing that person with an opportunity to attempt to persuade the decision-maker is an act profoundly disrespectful of that person's autonomy. Thus, it is argued, respect for one's person requires that he or she be given an opportunity to participate.

The extension of the "due process" hearing into the administrative state and its decision-making tribunals was (and is) an end vigorously pursued by activists and lawyers seeking "justice" for "disadvantaged groups". Due process hearings were pursued not only because they were (and are) strongly associated with a sense of justice in individual cases but also because it was hoped that due process hearings would operate as a check on bureaucratic decision-making. With respect to this latter aspiration, many worried (and worry, as the earlier discussion on dependency and vulnerability makes clear) that the securement of government benefits (unemployment insurance, welfare, etc.) would be hindered by difficulties in the

⁹¹ While recognizing that "due process" terminology originates in the United States Constitution, we use it in the text as it provides a convenient shorthand to refer to a full blown adversarial trial with all the indicia of "natural justice".

⁹² Brooks, *supra* note 87; Jerome Frank, *Courts on Trial* (Princeton University Press, 1949); Deborah Rhode, "Ethical Perspectives on Legal Practice" (1985), 37 *Stanford Law Review* 589.

⁹³ Brooks, *supra* note 87; Frank, *supra* note 92; Rhode, *supra* note 92; and Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change", [1974] *Law and Society* 95.

⁹⁴ This point was addressed in the famous decision of the United States Supreme Court, *Goldberg v. Kelly* 397 U.S. 254 (1969). In deciding that welfare recipients were entitled under the due process clause to a hearing prior to the termination of benefits, the court noted that a hearing wherein the beneficiary would have an opportunity to state his case and respond to that of his opponent was necessary to protect the beneficiary against an erroneous termination of his benefits (based on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of the case).

administrative process: arbitrary exercises of discretion; secrecy; and domination.⁹⁵ In the welfare rights literature and activism in the United States, and in Canada, the procedures embedded in the due process hearing were understood to operate as "effective checks on the characteristic evils of proceedings in any large public or private organization: closed doors, Kafka-like uncertainty, difficulty in locating responsibility, and rigid adherence to a particular point of view".⁹⁶ Due process hearings would require openness (disclosure of records, articulation of reasons), would permit individuals to challenge the state (not be dominated by it), and set standards which administrators would subsequently be required to follow. Actual hearings, and the threat of future hearings, would, it was argued, effectively check "bureaucratic evils".

It is also important to appreciate that notwithstanding the many limitations of the due process model (which are discussed below), its association with fairness and justice remains enormously powerful. For a great many persons, access to a full due process hearing (to one's day in court), and its underlying principle of party prosecution, is closely associated with a sense of justice. This association emerged clearly in the consultations undertaken by the Civil Justice Review. When group participants were asked for their views about the possibility of shifting towards a more inquisitorial process, without exception they stressed in their responses the importance of party control and expressed a deep scepticism about the fairness of an inquisitorial process. One of the most common complaints received by the Ontario Human Rights Code Review Task Force related to the lack of party control, (the commission investigates, and if a board of inquiry is struck, presents the case) and the lack of access to a hearing. As Etherington summarizes, "critical to this emphasis on access to justice are recommendations [of the Task Force] to empower the claimant community by giving it direct access to a hearing of its claims and the ability to direct its claim or presentation and to choose its preferred form of dispute resolution through mediation or adjudication."⁹⁷

In the context of poverty law, many academics, activists, and lawyers continue to work on the evolution of the *Charter* hoping to ultimately secure through the courts at least the assurance that governments are required to conform to the *Charter*, and in particular to the procedural component of "fundamental justice" in section 7, in their administration of benefits' programs. Teresa Scassa's recent article commenting on the decision of the Nova Scotia Supreme Court in *Conrad* is illustrative of this aspiration.⁹⁸ At issue in that case was the right to a hearing prior to the termination of welfare benefits. Scassa argues that "... if there are flaws in the administrative processes which serve as a final safety net for people facing poverty, then the interests of both those individuals and of the community at large would be

⁹⁵ Charles Reich, "Individual Rights and Social Welfare: The Emerging Legal Issues" (1965), 74 Yale Law Journal 1245.

⁹⁶ *Ibid* at 1253.

⁹⁷ Etherington, *supra* note 50 at 97. See Cornish, *supra* note 53 in particular at 1 - 7.

⁹⁸ Teresa Scassa, "Social Welfare and Section 7 of the *Charter*: *Conrad v. Halifax* (1994) Dalhousie Law Journal 187. See also Ian Johnstone, "Section 7 of the Charter and Constitutionally Protected Welfare" (1988), 46 University of Toronto Faculty Law Review 1; Ian Morrison, "Security of the Person and the Person in Need" (1988), 4 Journal of Law and Social Policy 1; and Martha Jackman, "Poor Rights: Using the *Charter* to Support Social Welfare Claims (1993), 19 Queen's Law Journal 65.

served by allowing *Charter* scrutiny of those processes to ensure they meet the principles of fundamental justice.”⁹⁹

Proponents of the due process hearing, and of procedural formality more generally, have also emerged to warn of the limitations, and indeed hazards, of “alternative dispute resolution”. While we review these claims in more detail below, the basic proposition is that procedural formality offers greater protection, and is more likely to dispense “justice”, than the informality characteristic of many alternative dispute resolution processes.

Contrasted against these various claims regarding the positive role of the due process hearing, but not in all cases inconsistent with these claims, are various critiques of due process.¹⁰⁰ It is probably conceded by most that the expansion of due process hearings in the administrative state has not secured justice for “disadvantaged persons” in terms of effectively checking bureaucratic discretion and domination. As Joel Handler points out, few claimants or beneficiaries of government benefits name or blame, and fewer still claim even when due process hearings are theoretically available. Many of the reasons for this we have already touched upon: lack of information (regarding the existence of an injury, the responsibility of another, potential remedies, etc.); lack of resources; dependency and vulnerability; lack of access to legal services; inequality of resources to litigate; the costs to the relationship of making a complaint; and the lack of a sense of entitlement. Another significant limitation is that fundamental to the conception of adversarial adjudication or the due process hearing is the notion of “party autonomy”. It is the responsibility of the party to identify an injury and make a complaint; the system is reactive. As Handler indicates, the system is dependent upon the complaining client, and not pro-active, seeking out errors or injustice. “[I]t assumes that regulation is satisfactory unless there are complaints... it assumes a knowing, alert citizenry jealous of its independence and possessive of its rights.”¹⁰¹ At the outcome end of the process, it also makes the problematic assumption—given the realities of bureaucratic defiance of law—that decisions rendered are self-enforcing; that norms articulated will be respected.¹⁰²

It is also true that an adversarial battle may be a particularly unappealing prospect for persons dependent upon the state for benefits essential to their sustenance. As Handler argues, persons dependent upon the state are in an on-going relationship characterized by a gross inequality of resources. Many appropriately fear engaging in a “big, complicated fight”¹⁰³ with an opponent who not only has the resources to win but, as discussed earlier, to extract a huge cost from the complainant in the form of retaliation. The due process model fails, as Handler rightly points out, to take account of the dependency, vulnerability, and lack of resources of

⁹⁹ Scassa, *supra* note 98 at 204-5.

¹⁰⁰ There are numerous other critiques of adversarial adjudication which we have not addressed here -- it is alienating, engenders hostility, curbs creative solutions, etc. We have not discussed these as they do not hold particular or pressing relevance for “disadvantaged persons”.

¹⁰¹ Handler, *supra* note 37 at 22.

¹⁰² The inaccuracy of this assumption is particularly well illustrated in the context of social assistance. While decisions of the Social Assistance Review Board are not binding, even where SARB has taken a consistent approach over a period of years on a given issue, its rulings are frequently ignored and front line administrative practices unchanged.

¹⁰³ The “big, complicated fight” metaphor comes from the work of Gerald Lopez, “The Work We Know So Little About”(1989), 42 Stanford Law Review 1.

the persons who are assumed by the model to bring the complaints necessary to ensure appropriate regulation. Understood in this light, due process fails both at the level of providing justice to individual claimants, and in the systemic goal of keeping bureaucracies in check.

The limitations of the due process model in accomplishing systemic goals other than that of keeping bureaucracies in check has frequently been identified. Etherington, for example, in his discussion of access to civil justice for racial minorities notes the "inadequacy of a complaint-driven mechanism to redress wrongs on an individual basis (like human rights processes) to address the issues of structural racism and systemic discrimination."¹⁰⁴ The Ontario Human Rights Code Review Task Force came to a similar conclusion.¹⁰⁵

In sum, the challenges are multiple: what model(s) of regulation will best ensure take up of government benefits; what model(s) of regulation will best curb arbitrary exercises of discretion, domination and secrecy; what model(s) of regulation will best address systemic discrimination; what model(s) of dispute resolution, (no matter the regulatory model we will continue to have disputes) will take account of the dependency, the on-going nature of the relationship, and the inequalities of resources in disputes between individuals and the state in the context of an on-going relationship of dependence; and is a different model required for disputes between private individuals than for those which arise between individual and state in the context of an on-going relationship of dependence?

While we do not have the answers these questions, there are several matters the consideration of which we think vital. We begin with a caution. That the due process hearing has not delivered fully on all of the expectations held out for it does not mean that it has been completely ineffectual and ought to be abandoned. In terms of securing justice in individual cases, as we have attempted to highlight in the above discussion, the association of due process and justice is deeply embedded in public consciousness. We do not suggest for a minute that this is a product of "false consciousness"; that members of the public (not to mention the judiciary and legal profession) are wrong to make this assumption. We do believe, however, that there are many ways to better ensure that the theory behind adversarial adjudication is translated into practice; to ensure that participation is meaningful and accuracy and dignity enhanced. And while alternative methods of regulation need to be pursued to enhance take-up, to check bureaucracy and to address systemic discrimination, the due process hearing nevertheless plays an important role.

With respect to models of dispute resolution, we do not believe, as many do, that answers to the limitations of the due process model which we identified above are necessarily found in alternative dispute resolution. We agree with the observations of Judge Nigel Fricker and Janet Walker that,

[it] seems unhelpful to the present debate to propagate the notion that the "traditional" legal process is necessarily adversarial, or that it is nasty and brutish and without merit. Indeed, arguments that the "new" mechanisms within A.D.R. are by definition "superior" are also spurious and tend to cloud the issue of how these other procedures can best be complementary to existing dispute resolution processes. We both begin our consideration of the issues from a belief in the validity and

¹⁰⁴ Etherington, *supra* note 50 at 91.

¹⁰⁵ Cornish, *supra* note 53.

centrality of a formal process of litigation and the right of citizens to have access to justice in its most institutionalized form.¹⁰⁶

There is now an enormous literature on A.D.R. and in the context of this paper it is simply not possible to review this literature in a comprehensive way. Therefore, what we have attempted to do is to focus largely upon an evaluation of the potential of A.D.R. to enhance access to justice for "disadvantaged persons and groups".

A.D.R. is a catch-all phrase to refer to an enormous array of dispute resolution forums and processes; from privatized adversarial adjudication (rent-a-judge, arbitration), to settlement conferences, to mediation facilitated by social workers or "community" members. The claims made with respect to the strengths and benefits of A.D.R. are equally expansive and frequently attributed to A.D.R. in all of its manifestations as though it were a monolith. In what follows we focus on those processes and forums which are more likely to touch the lives of the "disadvantaged": few economically "disadvantaged persons" will be parties to rent-a-judge proceedings while many are likely to be affected by mediation and particularly by a move to mandatory mediation in the context of family law.¹⁰⁷

As described by many of its proponents, mediation, as a process, offers a range of benefits: win/win solutions; creative outcomes fashioned in the shadow of the law but not constricted by formal legal rationality; direct participation which makes good on the promise of dignity (unlike due process which fails to do so because participation is usually so attenuated); improved communication paving the way for a better future relationship; harmony; low cost (less cumbersome and costly formal procedures); speed; flexibility; greater participant satisfaction; and more lasting results. Beyond these process benefits it is claimed that mediation (and similar processes) will relieve court congestion, enhance community involvement, and facilitate access to justice.¹⁰⁸ Challenges to each of these claims have been fully developed and many, we might add, are extremely persuasive. But, given time and space constraints, we propose to address specifically the potential of mediation (and other informal processes). In particular we want to consider whether mediation is capable of adequately taking account of the dependency, the on-going nature of the relationship, or the inequalities of resources in disputes between individuals and the state, or between private individuals.¹⁰⁹

The claim is frequently made that mediation is particularly well-suited to the resolution of disputes which arise in the context of an on-going relationship. Thus, disputes arising in families, in employment, in certain commercial contexts, and in housing (landlord and tenant)

¹⁰⁶ H.H. Judge Nigel Fricker & Janet Walker, "Alternative Dispute Resolution -- State Responsibility or Second Best?" (1994), 13 Civil Justice Quarterly 29 at 31.

¹⁰⁷ We feel compelled to address mediation in the family law context, notwithstanding that we were advised that family law was not part of the Civil Justice Review. First, notwithstanding the apparent exclusion of family law from the Review, family law process is in fact a matter addressed in the *First Report*. We take issue with some of the recommendations in this respect made in the *First Report*. Secondly, we feel compelled to address the recent announcement by the newly elected provincial government that it will seek to make mediation mandatory in the family law cases. We address these issues in the text, *infra*.

¹⁰⁸ See Fricker and Walker, *supra* note 106 at 33. The *First Report* cites virtually all of these ostensible benefits but as Fricker and Walker point out, frequently these claims are not borne out in practice.

¹⁰⁹ As far as we are aware, no one claims that mediation might meet other expectations held out for the due process model: an effective check on bureaucracy; and capacity to address systemic discrimination.

have often been identified as being well-suited for mediation.¹¹⁰ Other on-going relationships, such as those between welfare recipients and the state, have received relatively little attention in the A.D.R. literature. With the exception of the commercial context, the relationships in each of these contexts are frequently marked by vast inequalities of resources and of power more generally. Coupled with these power imbalances are the ideologies of mediator “neutrality” and “harmony”, both of which actively work in favour of the more powerful party. The ideology of mediator “neutrality” presupposes that the role of the mediator is simply to facilitate the communication necessary for the parties to come to their own agreement. For many, neutrality put into practice mandates non-intervention in aid of one of the parties to the mediation. As many authors have observed, the failure to intervene in circumstances where one party is taking advantage of the other can hardly be characterized as neutral.¹¹¹ To the contrary, non-intervention works to actively promote the interests of the more powerful party.

The “harmony” ideology of mediation has a number of problematic ramifications. It signals that one ought to make concessions—it’s a process of give and take to reach an amicable settlement. This can be problematic in a context where one is seeking to have a legal right acknowledged and enforced.¹¹² Why should this party be expected to make any

¹¹⁰ The *First Report* buys into this notion, maintaining that landlord - tenant and family law cases are particularly well-suited to mediation because the disputes arise in the context of a on-going relationship; see the *First Report*, *supra* note 11 at 276 & 299.

As the discussion in the text, *infra*, makes clear, we do not agree with the suggestion that disputes in each of these contexts are well-suited for mediation. We also wish to challenge the notion that “suitable” cases can be screened into the mediation process. As many of the background papers for the Civil Justice Review have pointed out, there is absolutely no consensus on what cases are appropriate and hence, what the screening criteria ought to be (in particular see Owen Fiss, *supra* note 80). Moreover, even if one was to settle these issues, it’s not at all clear that one can adequately identify the existence of the identified criteria. Take for example, cases involving wife abuse. Many are of the view that family law disputes, where there has been a history of violence, ought not to be mediated (but little agreement over how much violence, or how recent). However many women will not readily disclose the violence and thus it is often extremely difficult to accurately identify whether the “criterion” for screening exists or not.

The *First Report* identifies a number of screening criteria. Many of the criteria are not only vague, but whether they point in favour of or against mediation is unclear: the nature of the case, complexity, number of parties, relationship of the parties, disparity in bargaining power, history of the negotiations, relief sought, and size of the claim as the relevant screening criteria. The Report describes only the theoretical or alleged benefits. It fails to consider either whether these benefits have been realized in practice or the potential harms of A.D.R. The *First Report*, *supra* note 11 Chapter 13.5, 119-20 in particular.

¹¹¹ See for example, Martha Shaffer, “Divorce Mediation: A Feminist Perspective” (1988), 46 University of Toronto Faculty Law Review 349. There is an extensive literature which critiques mediation in the context of family law dispute resolution, see for example Martha Fineman, “Dominant Discourses, Professional Language and Legal Change in Child Custody Decisionmaking” (1988), 101 Harvard Law Review 727; N. Zoe Hilton, “Mediating Wife Abuse: Battered Women and the ‘New Family’” (1991), 9 Canadian Journal of Family Law 29; T. Grillo, “The Mediation Alternative: Process Dangers for Women (1991), 100 Yale Law Journal 1545; Barbara Hart, Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation (1990), 7 Mediation Quarterly 317.

¹¹² See Walker & Fricker, *supra* note 106 at 33 or 34; Fineman, *supra* note 111; and Richard Delgado et al., “Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution”, [1985] Wisconsin Law Review 1359. Richard Abel takes this argument further in maintaining that “informalism inhibits social

concessions?¹¹³ While we do not mean to suggest that one can never voluntarily agree to concede a legal right, nor that parties ought not to be permitted to resolve their disputes other than in accordance with the normative parameters recognized by law, we do think it critical to attend to the notion of voluntariness. Voluntariness requires more than the absence of explicit or indeed, subtle coercion. Explicit coercion in this context frequently comes in the form of mandatory mediation, or the “strong arm” of the mediator.¹¹⁴ Subtle coercion may be pervasive within the mediation process because of the expectation of settlement and compromise. Voluntariness requires a real choice of options, adequate information about one’s legal rights and entitlements, and mechanisms that in some manner redress the inequalities of power. We emphasize real choice here to signal the importance of attending to the social and economic context in which choices are exercised. For those with few economic resources no meaningful choice exists if one option is enormously expensive, the other inexpensive. This observation has led many to express the concern that the creation of institutionalized A.D.R. will result in its substitution for the right of “disadvantaged groups” to litigate and would create a two tier justice system, “that dispenses informal “justice” to poor people with “small claims” and “minor” disputes, who cannot afford legal services, and who are denied access to courts”.¹¹⁵

This leads us to a second implication of the harmony ideology. It positions lawyers or other advocates as antithetical to “good” outcomes because their adversarial tactics are seen to undermine the process. While in the context of family law mediation, review of mediated agreements by lawyers is encouraged¹¹⁶, all other forms of participation by advocates is usually discouraged.¹¹⁷ In the context where one party is much better resourced in terms of knowledge about the law, and experience in negotiating, this raises concerns that legal rights

change by persuading disputants with legitimate grievances to sacrifice their grievances in the interests of peace and cooperation.”

¹¹³ In commenting upon neighbourhood justice centres, wherein “community” based mediation is practised, Laura Nader observes that disputes are treated as “communication problems” rather than conflicts over values, interests, behaviours, or needs,” and observes that “unequal power does not enter the paradigm... Conflict is personalized and localized in the realm of emotion. ... The issue of justice becomes irrelevant and the plaintiff is increasingly made passive”. See Laura Nader, “Processes of Constructing (No) Access to Justice (For Ordinary People)” (1990), 10 Windsor Yearbook of Access to Justice 496 at 503.

¹¹⁴ “Private, informal procedures which enjoy the authority of the courts, but which are stripped of the procedural safeguards of adjudication, carry the risk of unregulated coercion and covert manipulation”...[public confidence and trust in the service may be eroded] by a public perception that the courts commonly coerce litigants into settlements, in which justice plays little part, in order to achieve administrative targets, such as keeping judges sitting throughout the day or clearing court lists.” Walker & Fricker, *supra* note 106 at 38, discussing and citing the work of Roberts, “Mediation in the Lawyer’s Embrace (1992), 55 Modern Law Review 258.

¹¹⁵ Larry R. Spain, “Alternative Dispute Resolution for the Poor: Is It An Alternative?” (1994), 70 North Dakota Law Review 269 at 273.

¹¹⁶ See for example, Rule 25 of the Professional Conduct Handbook, Law Society of Upper Canada. For citations to articles which address mediation in the context of family law see footnote 111.

¹¹⁷ See for example, Alison Smiley, “Professional Codes and Neutral Lawyering” (1993), 7 Georgetown Journal of Legal Ethics 213.

may be conceded through ignorance of them or an inability to successfully negotiate their respect.¹¹⁸

The informality of mediation may also work in favour of more powerful parties. This claim has been particularly well developed in the context of disputes involving racial minority persons. Delgado et al. argue, based upon theories of prejudice which suggest that much prejudice is environmental (people express it because the setting encourages or tolerates it), that the rules and structures of formal justice tend to suppress bias, whereas informality tends to increase it.¹¹⁹ They argue that two features of formal settings decrease opportunities for the expression of racial bias; aspects of the role of judges (freedom from political pressure, commitment to apply rules, *stare decisis*, and codes of conduct); and several basic features of legal procedure (public trials, requirements of courts to give reasons, guaranteed opportunities to call and contest evidence, pre-trial discovery, and the rules of evidence).¹²⁰ They conclude that formality and adversarial procedures counteract bias among legal decision-makers and disputants.¹²¹ They also maintain that minority group members are more apt to participate in processes which they believe will respond to reasonable efforts and thus, that "it is not surprising that a favoured forum for redress of race-based wrongs has been the traditional adjudicatory setting. Minorities recognize that public institutions, with their defined rules and formal structure, are more subject to rational control than private or informal structures".¹²²

While acknowledging that informal processes may less effectively curb racial and other biases than formal processes (this is not of course to suggest that formal processes are free of bias against "out groups"), other commentators have suggested that if the introduction of state-sponsored alternative disputes resolution processes and forums results in an over-all increase in the capacity of the system to deal with disputes, and in the availability of less costly alternatives (neither of which necessarily follows from the introduction of institutionalized A.D.R.), access to justice for the poor may be enhanced in the sense that access may be had to at least some form of dispute resolution where none was available before.¹²³ But if these alternatives fail to take seriously systemic inequalities of power and if "disadvantaged persons"

¹¹⁸ We recognize that the involvement of lawyers or other advocates *may* undermine the process in ways that work against the interests of the participants. As discussed *infra*, while we strongly endorse a pervasive role for legal and other advocates, we also are deeply critical of the form and manner in which many legal services are currently delivered.

¹¹⁹ Delgado et al., *supra* note 112. See also Lawrence Bobo, "Prejudice and Alternative Dispute Resolution" (1992), 12 *Studies in Law Politics and Society* 147.

¹²⁰ Delgado et al., *supra* note 112. They also review several studies which found that minorities viewed adversarial procedures as the most preferable and the fairest mode of dispute resolution, (at 1388).

¹²¹ *Ibid* at 1389.

¹²² *Ibid* at 1391. Silbey comes to a similar conclusion in her comparison of the perspectives and experiences of whites and non-whites with law and the courts. While there were no significant differences in the willingness of members of the two groups to turn to law, minorities were more critical of the law and of courts in their dispensation of justice and fairness. Silbey speculates that "while not fulfilling the ideal of equal treatment, it [the legal system] may be better than informal, unregulated arenas." Silbey, *supra* note 5 at 268.

¹²³ See for example Lawrence Bobo who suggests that there are competing claims with respect to what ought to count as a good outcome; ie more pretrial settlement may increase number of minorities who can get access "to justice", *supra* note 119 at 152-3. See also Spain, *supra* note 115.

are routinely encouraged (if not coerced) to concede legal rights, there is good reason to doubt that greater numbers will have access to a forum for dispute resolution—who would seek out such forums? There is equally good reason to doubt that justice in any substantive sense would be enhanced for “disadvantaged persons”.

Many claim that mediation and other informal methods of dispute resolution are empowering, both for individuals and potentially for communities. At least for individuals, this is understood to be possible because disputants participate directly in the resolution of their own dispute.¹²⁴ For many the experience may well be empowering. But it is unlikely to be for “disadvantaged persons” when pitted against powerful adversaries. The other piece of the empowerment claim is that because the disputants are not bound by the rational application of law, they are free to select the normative principles that will inform the resolution of the dispute. At the level of community, the claim has been made that community-based mediation (wherein the mediation is conducted by a panel of mediators from the community) offers the scope for the enunciation and development of community norms. This claim is one frequently made with respect to “neighbourhood justice centres”.¹²⁵ As Cohen notes, “in theory, neighbourhood programs allow prompt community resolution of disputes using community values instead of the rule of law... Applying shared values, [they] solve certain community problems more effectively than the court system.”¹²⁶ Nader appropriately questions this theory,

...Neighbourhood justice organizations, one outcropping of ADR reform, were set up on a Crown policy model: “Let’s make believe that this is a self-contained community and let’s make believe that within this community you can create your own organizations to increase access to justice”. The community was a make-believe, the self-containment was a make-believe, and the idea that problems that they might take to justice were only between people who lived in the community was make-believe.¹²⁷

While we, like Nader, are wary about the claims regarding the application and evolution of community norms and values for the reasons she articulates, we do believe that there is at least one special case wherein community-based dispute resolution is genuinely community-based. Here we refer specifically to First Nations communities.¹²⁸ While we discuss this in somewhat more detail *infra* we also want to emphasize that a mediation-style process, located within a culture respectful of the principle of harmony and based upon very different cultural traditions

¹²⁴ See for example, Jay Folberg and Alison Taylor, *Mediation* (San Francisco: Jossey-Boss, 1984).

¹²⁵ The origins of the neighbourhood justice centre have been traced to the Pound conference in 1976 after which 3 pilot projects were funded by the United States federal government. Professor Frank E.A. Sander, of Harvard Law School, has been dubbed the “father” of the movement. See Edith Primm, “The Neighborhood Justice Center Movement” (1992-3), 81 Kentucky Law Journal 1067; and James R. Cohen, “Community-Based Dispute Resolution” (1991), 12 Hamline Journal of Public Policy and Law 13.

¹²⁶ Cohen, *supra* note 124 at 18, 20.

¹²⁷ Nader, *supra* note 113 at 502. Many believe that the real goals served are the reduction of court dockets, and the expansion of the arm of the state into more and more aspects of life.

¹²⁸ There may well be others. We think Etherington is right to posit that there “may be greater potential for their [A.D.R.] use in ethnic communities with established norms to resolve disputes by informal, community-rooted methods; Etherington, *supra* note 50 at 98.

than those found in dominant Canadian society, is not subject to the whole of the critique of mediation which we have advanced above.

In sum, there seems to be no reason to believe that mediation, or other informal dispute resolution processes, hold out much promise for oppressed persons in terms of access to justice. The barriers to naming, blaming and claiming that impede access to a due process hearing also impede access to mediation. As a process of dispute resolution, mediation, while potentially less expensive, fares even less well than adversarial adjudication in addressing imbalances of power. It is hard to imagine that a person dependent upon the state (or abusive husband, or landlord) in an on-going way would be any more willing to take on conventional power through mediation, than through a due process hearing. It is not at all hard to imagine that such a person might fare less well if mediation is the process of dispute resolution.¹²⁹

Where does this leave us then in terms of dispute resolution processes? First, it is clear that simply creating opportunities for mediation will not improve access to justice for "disadvantaged groups"; nor indeed would simply creating additional opportunities for due process hearings. It seems to us that whatever the process, attention must be given to what would be the necessary pre-conditions for meaningful participation. As Tyler suggests in his research on small claims courts, "...disputants place great weight on having a dispute settled in a way which is perceived to be fair... one important element in perceiving the procedure to be fair relates to the opportunity to participate in the process..."¹³⁰ Both mediation and adversarial adjudication claim to value party participation yet both have been criticized for failing to respect it in practice; the former largely because of inequalities of bargaining power and the latter because of the attenuated form that participation usually takes. What are the pre-conditions for meaningful participation? At a very general level these include an understanding of the process(es); real choice about entering the process, or as between processes; adequate information about legal rights, entitlements, obligations and remedies; advocacy supports; a conceptualization of advocacy which respects client narratives (see discussion *infra* of advocacy services); an opportunity to tell one's story; and a decision-maker or mediator who is able to hear and respect that story and its teller (see discussion *infra* on personnel of the justice system). While both mediation and adjudication could be dramatically improved should these pre-conditions be satisfied, it nevertheless is imperative that persons not be required to mediate disputes. As we stated at the outset, quoting from Walker and Fricker, "[w]e both begin [and end] our consideration of the issues from a belief in the validity and centrality of a formal

¹²⁹ Many of the critiques of mediation which we have raised in the text were noted during the consultation process. The anti-poverty group emphasized concerns about inequalities of bargaining power, as did the women's group and the disability group. The women's group also expressed concern about the re-privatization of women's concerns. Two groups also noted the potential of marginalization. The disability group pointed out the problematic expectation of compromise. The mixed group noted that the coercion of settlement through A.D.R. frustrates peoples' search for justice.

¹³⁰ Walker & Fricker, *supra* note 106 at 37, discussing Tom Tyler's research. Deborah Hensler makes a similar point in her comments on Roderick Macdonald's background paper for the Civil Justice Review. She notes that assessments of the fairness of the process are as, if not more, important as the substantive outcome, and that views of process fairness "seem to be grounded in basic notions of what constitutes fair treatment, e.g. being paid attention to, given the same due as others in the dispute, being treated in a dignified fashion". Hensler, *supra* note 7 at 237. One of the participants in the consultation process posed the question of, "what is it that persons seek in dispute resolution?" and answered it in the following way: "persons want to be understood, to understand the process, to be treated with respect, and to be treated fairly and without delay."

process of litigation and the right of citizens to have access to justice in its most institutionalized form". For all of the reasons we have just canvassed then, any move to make mediation mandatory in the context of family law (as the new government has promised) or in the context of landlord-tenant law (as the *First Report* suggests¹³¹) will further impede access to justice for disadvantaged groups.

Recommendations

11. Mediation or other "alternative dispute resolution" process must never be made mandatory. Where mediation or other A.D.R. process is available, there must be a real choice as between entering that process and entering a formal adjudicatory process. This requires that where alternatives are developed attention be paid to the social and economic context of potential litigants.
12. In the preceding discussion we identified, but were unable to address within the scope of this paper, a range of questions arising out of our analysis of the due process model. These questions and issues ought to be the subject of further research and study. These include: given that the due process model has largely failed to deliver upon the promise of keeping bureaucracies in check, how might this best be accomplished?; given the inadequacy of a complaint-driven mechanism for addressing systemic discrimination, what are the alternatives?; and how is the take-up of government benefits best ensured?

4. JUSTICE SYSTEM PERSONNEL

As suggested at the outset, absent in many of the conceptualizations of access to justice is attention to what we have argued is an integral component of access to justice, the personnel of the justice system. In this section we consider the various personnel of the civil justice system and their importance in access to justice for members of "disadvantaged groups". There are three major groups of players with whom members of "disadvantaged groups" must deal in any formal engagement with the civil justice system: advocates; decision-makers (and increasingly mediators); and the administrative personnel of various courts, agencies and tribunals. While access to a institutional decision-maker is frequently equated with access to justice, the equation of access to legal services (or lawyers) with justice may be even more pervasive. However, the equation, in both contexts, we will argue, breaks down under scrutiny.

(a) LAWYERS AND OTHER ADVOCATES

Roderick Macdonald states, "[b]ecause modern law is so complex and voluminous, without an experienced lawyer as a guide, civil justice is unattainable".¹³² This is often as true for

¹³¹ *First Report*, *supra* note 11 at 297 ff.

¹³² Macdonald, *supra* note 34 at 80. See also David Luban, who like Macdonald, observes that "all of our legal institutions (except small claims courts) are designed to be operated by lawyers and not laypersons. Laws are written in such a way that they can be interpreted only by lawyers; judicial decisions are crafted so as to be fully intelligible only to the legally trained. Court regulations, court schedules, even courthouse architecture are designed around the needs of the legal profession." Luban argues that because society and the legal profession have created the complexities of law so that it then becomes necessary to have a lawyer (or other advocate) to

“informal” administrative proceedings as it is for formal justice in the civil courts, although “lawyer” in this formulation might be replaced by “advocate” to include the non-lawyer advocates who represent people in a range of civil proceedings outside the formal court system. There are few forums in which the likelihood of success or the risk of failure is not strongly affected by representation. And as we argued in the preceding section, it is not only adversarial adjudication which is affected by representation and access to legal advice and information, but all manner of processes. This may be illustrated by the experience of the Social Assistance Review Board (SARB), an administrative tribunal that hears appeals in social assistance matters. Many appellants are unrepresented at SARB, it has relatively simply and straight-forward hearings procedures and has in recent years gone to great lengths to be accessible to unrepresented appellants. Nevertheless, an unrepresented appellant at SARB in 1993-94 had about a 34% chance of success; his or her chances of success rose to 51% if accompanied by a family member, friend or representative; and to 67% if accompanied by a legal representative.

In this section we consider the role of both lawyers and non-lawyer advocates in the broader civil justice system. However, because of the monopoly of the legal profession on many aspects of advocacy in the legal system and because lawyering is still very much the paradigm of legal advocacy, most of our attention will be on the legal profession itself.

Many of the barriers to accessing legal services are routinely identified and discussed in the access to justice literature: the costs of lawyer’s services; the failure of the (potential) client to realize that he or she has a legal problem; and whether a lawyer is even available (especially to people in rural or remote areas). Less commonly identified barriers include the physical inaccessibility of lawyers’ premises for persons with disabilities, the incidental costs of seeing a lawyer, (travel, childcare, etc.), and whether there is a legal cause of action or remedy potentially capable of capturing the real matters in issue. Throughout the literature it is assumed that lawyers, once accessed, make only positive and meaningful contributions to the quest (be it individual or collective) for justice. The issue for access to justice, as commonly depicted, is to address the barriers to legal services identified above. The nature and quality of those services is rarely put in issue. Without meaning to suggest for a moment that these barriers are irrelevant to the quest for justice, in what follows we put in issue, as do many “disadvantaged groups”, the nature and quality of many of the legal services currently provided. We maintain that many lawyers frequently not only fail to advance the quest for justice, but actively hinder it.

The legal profession is obviously not representative of many of the groups who we would include as “disadvantaged”. There are few lawyers from visible minority communities, particularly the visible minority communities in which economic and social disadvantage is clearest. There are few First Nations lawyers. Few lawyers have serious disabilities or have experiences of disability. Few lawyers have first-hand (or for that matter even second-hand) experience of life in poverty or the operations of the social assistance system. Even though women have made tremendous advances in the legal profession in the last couple of decades, there is still considerable evidence of discrimination against women (and against other

access much of it, both have an ethical responsibility to the public to ensure access to legal services. David Luban, *supra* note 33 chapter 11 and 244 in particular.

disadvantaged groups) within the profession.¹³³ This means that women are still under-represented in influential areas of the profession (including the judiciary, as we discuss further below).¹³⁴

The unrepresentative make-up of the legal profession means that many members of "disadvantaged groups" are not able to find a lawyer who understands their background, their experience of disadvantage, and/or their language, or indeed who knows the areas of law which most impact upon their lives (social assistance, workers' compensation, disability benefits, duty of accommodation, human rights, etc.).¹³⁵ The implications for access to justice of the unavailability of lawyers with whom one can speak because of language or other communication barriers, or because of lack of knowledge of the relevant law are obvious; the links between an understanding of the experience of disadvantage and of background (or more generally of context) perhaps less obviously so. With respect to the latter, the title of Gerald Lopez' article, "The Work We Know So Little About" begins to unravel the links.¹³⁶ Lopez and others have argued that frequently well-meaning lawyers in their representation of the "disadvantaged" are not only unhelpful but bring about results which, while regarded by the

¹³³ See the Canadian Bar Association Task Force on Gender Equality in the Legal Profession, *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: Canadian Bar Association, 1993) and the various provincial reports discussed therein, including *Transitions in the Ontario Legal Profession* (Toronto: Law Society of Upper Canada, 1991); Shelina Neallani, "Women of Colour in the Legal Profession: Facing the Familiar Barriers of Race and Sex" (1992), 5 Canadian Journal of Women and the Law 148; and John Hagan and Fiona Kay, *Gender in Practice: Lawyer's Lives in Transition* (New York: Oxford University Press, 1995), "The Persistent Glass Ceiling: Gendered Inequalities in the Earnings of Lawyers", forthcoming British Journal of Sociology, and "Changing Opportunities for Partnership for Men and Women Lawyers During the Transformation of the Modern Law Firm", 32 Osgoode Hall Law Journal 413.

¹³⁴ Chris Tennant identifies the harms of exclusion for the legal profession;

...[t]he exclusion of such voices is harmful to every member of the legal profession. Not only does devaluing the perspectives and experiences of excluded groups make the legal profession a less hospitable environment for members of those groups it impoverishes legal culture generally. The failure of traditional legal approaches in the face of a wide spectrum of difficult issues, from childcare to recidivism to the quality of life of practitioner is evident. The legal profession will be much better able to address these issues if it can call upon the widest possible range of perspectives and experiences.

Tennant, "Discrimination in the Legal Profession, Codes of Professional Conduct and the Duty of Non-Discrimination" (1992), 15 Dalhousie Law Journal 464.

¹³⁵ Participants in the Disability Group consultation noted the lack of access to effective legal services; few private lawyers understand the issues, and know the relevant law. There is also a substantial academic literature on this point; see for example, Gerald Lopez, *supra* note 103; Anthony Alfieri, "The Antinomies of Poverty Law and a Theory of Dialogic Empowerment" (1986-7) XVI Review of Law and Social Change 659, "Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative" (1991), 100 Yale Law Journal 2107, "The Politics of Clinical Knowledge" (1990), 35 New York Law School Law Review 7; and Lucie White, "To Learn and Teach: Lessons From Driefontein on Lawyering and Power", [1988] Wisconsin Law Review 699, "Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G. (1990), 38 Buffalo Law Review 1.

It was the lack of knowledge among members of the bar with respect to poverty law that was one of the factors which led to the creation of community legal clinics.

¹³⁶ Lopez, *supra* note 103.

lawyers as positive (a legal victory for instance), may actually harm their clients.¹³⁷ This occurs because lawyers frequently fail to grasp the context of the “disadvantaged” client’s legal problem; so for instance, lawyers fail to grasp the threat to a client of taking on conventional power or the disruption and harm to a client’s life which may follow even a legal victory. The failure to understand context derives, in part, from the fact that most lawyers occupy a very different social position than do their “disadvantaged” clients. We do not mean to suggest that only lawyers who share a common history and social status with their clients are capable of rendering effective services to them; nor to suggest that shared experiences necessarily lead to effective services. However, a common history or shared social context will frequently put the lawyer in a better position to provide more effective legal services. But we are also of the view that even lawyers whose lives are radically different from those of their clients are able to deliver effective legal services—provided they are prepared to learn much more about the reality of their clients’ lives.

One final point in this context; the preceding discussion has not assumed any bad will on the part of the profession in the problems of exclusion from the legal profession and the justice system. Reality is less than sanguine. There is no shortage of open racism, sexism and hostility towards the poor in the legal profession. There is also no shortage of discriminatory attitudes and behaviour within the profession. When work was being done at the Law Society of Upper Canada on the drafting of a non-discrimination clause (Rule 28 of the Professional Conduct Handbook) many lawyers reacted with shock and anger at the draft rule and draft commentary which were circulated amongst the profession for comment in June, 1993. Some lawyers asserted their “right” to follow practices that violated the *Human Rights Code*. One senior member of the bar wrote a vitriolic letter to the Law Society attacking the attempts to draft an anti-discrimination policy as part of a “feeding frenzy by fanatics on the subjects of racism, sexism, ethno-equity and other similar politically correct zealotry”, and demanding the names and addresses of the members who had worked on the anti-discrimination rule, stating; “I intend to have the public records examined for the writings, speeches and professional history of the persons concerned.”¹³⁸

Lawyers may also impede access to justice in another manner. As many authors have noted, lawyers often treat their clients—particularly those with relatively little power—in a paternalistic fashion, purporting to know, better than the client him or herself, what is in the client’s best interests.¹³⁹ This is problematic not only because it undermines client autonomy and dignity, but also because as discussed above, lawyers frequently have little or no understanding of the lives of their “disadvantaged” clients and of the context in which their legal problem is immersed. In a related manner, poverty lawyers in particular have been criticized for their suppression of client narratives; for their failure to actively listen to and engage with the client’s story.¹⁴⁰

¹³⁷ Lopez, *supra* note 103; White, *supra* note 135; Alfieri, *supra* note 135.

¹³⁸ Letter provided to the authors by one of the lawyers against whom it was directed.

¹³⁹ See for example, Richard Wasserstrom, “Lawyers as Professionals: Some Moral Issues” (1975), 5 *Human Rights* 1; William Felstiner & Austin Sarat, “Enactments of Power” (1992), 77 *Cornell Law Review* 1447; and Stephen Ellman, “Lawyers and Clients” (1987), 34 *UCLA Law Review* 717.

¹⁴⁰ See Wasserstrom, *supra* note 139; White, *supra* note 135; Alfieri, *supra* note 135.

Other issues related to the organization and delivery of legal services also have implications for access to justice. Most legal services are delivered in an individualized manner, (case-by-case representation) with a corresponding anti-critical bent. This means that systemic issues frequently go unidentified and thus unaddressed. (The potential of community clinics to redress this is discussed in the section on advocacy, *infra*.) Additionally, legal services are largely organized as passive—they are organized in a manner which presumes that clients will identify a grievance, will know how to seek out lawyer, and will believe that the system can accommodate their grievance and provide some legal remedy for it. These assumptions are deeply problematic. If we acknowledge that power operates both to preclude certain issues or interests from recognized channels of disputing, and to prevent harms or grievances from being acknowledged at the level of consciousness, a passive, individualized and anti-critical model of lawyering (or of advocacy more generally) is completely ineffectual in meeting the needs of “disadvantaged groups”.¹⁴¹

Recommendations

13. Steps need to be taken to ensure that the legal profession becomes more inclusive and representative.
14. Models for the delivery of legal services which are attentive to the realities of the lives of disadvantaged persons must be preserved and strengthened—see the discussion of community legal clinics *infra* in the Advocacy section.

(b) JUDGES AND OTHER DECISION-MAKERS

The other major players in the civil justice system are the decision-makers. This includes not only judges but the adjudicators in a wide range of administrative agencies and tribunals, arbitrators, mediators, etc. The latter groups have a particularly wide range of experiences and qualifications. Some of the comments of this section will be relevant to all decision-makers, and “third-party neutrals”, judicial and otherwise. However, we pay particularly close attention to judges. Judges are still the first level decision-makers in a number of important civil justice areas, including some of special concern to people who face particular disadvantage. Furthermore, judges play a crucial role in respect of almost all formal decision-making in the administrative state, through appeals and judicial review. And, very importantly for members of equality seeking groups, judges—who of course have the last word on what they can and cannot do—control the application of the *Charter of Rights*.

As with lawyers, judges have tremendous impact upon the quest for justice; sometimes positive, but often negative. Judges are, of course, lawyers and we have already noted the problems posed by the elite selection processes of the profession. Most judges in the civil justice system in Ontario are (-)male, (-)abled, (-)white—and, of course, rich.¹⁴² Higher court

¹⁴¹ White, *supra* note 135 in her article “To Learn and Teach” uses S. Lukes analysis of power in relation to different models of lawyering.

¹⁴² D. Olsen, *The State Elite* (Toronto: McClelland and Stewart, 1980); P. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987). Even supporters of the judicial system as it is are driven to acknowledge that there are concerns about its representativeness: P. McCormick & I. Greene, *Judges and Judging: Inside the Canadian Judicial System* (James Lorimer & Co., 1990). For a historical

judges especially tend to be drawn from the elite of the profession, most having spent their careers in the service of the economically and socially advantaged. Judges are by their very nature a socially and politically conservative group. Most, we suggest, tend to share the ideological preferences, political views and senses of social, economic and political priorities of the elite group from which they are drawn, and recent evidence indicates that there is marked difference between the priorities of this elite group and the broad general public.¹⁴³ The experiential gap between the lives of judges and the lives of the most marginalized members of society is even greater—it is easily forgotten, given the context of most discussions about judicial remuneration, just how enormous the gap is between judges' economic situations and the economic situations of the disadvantaged.¹⁴⁴

These characteristics have a great deal to do with what members of "disadvantaged groups" can expect from the judiciary. Who judges are, where they come from, what they know and don't know, what they consider to be important and not important: all of these factors affect their decision-making.¹⁴⁵ This does not mean that attributes of privilege and ideological preferences are monolithic or immutable. They are fragmented, contingent, and subject to reinforcement or transformation depending on personal attitudes, outside pressures, information available and other variables.¹⁴⁶ Nevertheless, the judiciary is heavily weighted towards one end of a long spectrum and this has many implications for what the disaffiliated can expect from the judicial system.

At the most immediate level of daily adjudication, the exercise of "fact finding" is clearly coloured by attitudes towards witnesses, assumptions about how "credibility" is manifested, beliefs about what "reasonable" people would do in particular circumstances, etc. In the Civil Justice Review consultations, advocates who represent members of visible minorities and immigrant communities made it clear that they believe that judges are often insensitive to issues of race and culture.¹⁴⁷ Opinions were also expressed that some judges treat counsel who

perspective on judicial politics see J.A.G. Griffiths, *The Politics of the Judiciary* (1981); Michael Ornstein, "Canadian Capital and the Canadian State: Ideology in an Era of Crisis".

¹⁴³ Ekos Research Associates, *Rethinking Government* 94-2. See also Joel Bakan et al., "Developments in Constitutional Law: The 1993-94 Term" (1994), 6 *Supreme Court Law Review* (2d) 67.

¹⁴⁴ See also L. Corbeil, *The Impact of Poverty on Fairness in Judicial Proceedings* (Ottawa: National Anti-Poverty Organization, 1992) [unpublished], quoted in Jackman, "Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination Under the Canadian *Charter* and Human Rights Law" (1994), 2 *Review of Constitutional Studies* 77 at 91.

¹⁴⁵ See F. Cohen *Transcendental Nonsense and the Functional Approach* (1935), 35 *Columbia Law Review* 809.

In the consultation process, the failure of perspective was identified over and over; the failure of judges to understand the issues facing poor people, the failure of judges to understand the issues facing racial minorities, the failure to understand the issues facing persons with disabilities.

¹⁴⁶ For example, the appointment of women judges (despite their small numbers on the bench), judicial education, shifting public attitudes towards gender norms, and years of work by feminist academics and activists to unpack the gender bias of laws and legal institutions, have all probably combined to bring about some important changes in the attitudes, behaviour, assumptions and sensitivities of many judges on gender issues, even though there is still a long way to go.

¹⁴⁷ They noted that judges lack knowledge relevant to the issues facing their clients. One participant indicated that there is a lack of confidence in the justice system in the black community; that the system is seen as neither neutral

are members of visible minorities differently and less well than white counsel.¹⁴⁸ This opinion has also been expressed to us by lawyers from visible minority groups in private conversations, although most lawyers who have to regularly appear in the courts are understandably reluctant to make such opinions public. There are numerous studies and complaints of similar kinds of problems and barriers stemming from gender bias and stereotyping, stereotypes of particular kinds of disabilities, etc.

While it is now common to claim that some people are at a disadvantage in an adjudicative setting because of how they communicate in relation to how they are heard (the most obvious example is the role of cultural norms and expectations in how credibility and character are assessed¹⁴⁹), this can perhaps be generalized further. Disempowerment itself may be a disadvantage in formal adjudication settings. Peoples' economic realities themselves can have an important—and usually negative—effect on credibility. For example, the realities of life in poverty involves survival strategies which are beyond the comprehension of those who know nothing about poverty and therefore appear as devious or dishonest behaviours.¹⁵⁰

A recent American study of speech and conduct in civil proceedings by legal anthropologists made some very significant findings.¹⁵¹ It concluded first, using sociological techniques of discourse analysis that focused more on presentation than content, that some participants in the legal system tend to speak in a fashion that the authors called “powerless” speech, and that people who used powerless speech were more likely to be disbelieved by judges. The study also found that the use of “powerless speech” also tended to be closely correlated with an orientation towards the nature of justice which conflicted with the dominant understandings of the legal system and perhaps also contributed to legal failure. The authors state in part:

Our experimental research on speech style and its effects on legal decisionmakers demonstrated that powerless speakers are believed significantly less often than their powerful counterparts. We find a convergence of the tendencies towards the powerless speech style and the relational orientation, and a complementary convergence of rule orientation [i.e., the dominant legal paradigm] and the absence of powerless stylistic features. Thus, it may be that the burden of stylistic powerlessness, which falls most heavily on women, minorities, the poor and the uneducated, is compounded on the discourse level by the tendency among the same groups to organize their legal arguments around concerns that the court is likely to treat as irrelevant.¹⁵²

The elite nature of the judiciary has an impact on the legal system beyond simply the resolution of disputes in particular cases. As we have already noted, judges in the civil justice system have the last say over doctrinal development not only in matters that are treated

nor impartial. The lack of confidence in the system was attributed, at least in part, to the lack of visible participation of black people in the system.

¹⁴⁸ Metro Chinese clinic submissions.

¹⁴⁹ Rupert Ross, *Dancing with a Ghost: Exploring Indian Reality* (Markham: Octopus Publishing Group, 1992).

¹⁵⁰ I. Morrison, “Facts About Social Assistance Administration that Criminal Lawyers Ought to Know”, (1995) Law Society of Upper Canada, Department of Continuing Legal Education.

¹⁵¹ John Conley and William O'Barr, *Rules v. Regulation: The Ethnography of Legal Discourse* (University of Chicago Press, 1990)

¹⁵² *Ibid* at 173.

through the civil justice system, but in their role as appellate and review judges over the administrative state.¹⁵³ The exact influence of judicial privilege on the development of law as it affects “disadvantaged” people would be very hard to analyze, partly because it is impossible to completely separate the role of judges per se from all of the influences of the legal system which affect these matters. Nevertheless, some observations can be made.

The civil justice system is organized around explicit and implicit hierarchical norms in which the most important legal concerns of the “disadvantaged”—those which actually get to court at all—tend to be marginalized. There is plenty of anecdotal evidence and some empirical evidence, strongly reinforced by common sense, that most judges dislike dealing with poor people’s legal issues generally and poverty law issues specifically.¹⁵⁴ Judges tend to think that cases which involve a lot of money are important and cases that do not involve a lot of money are not, unless personal liberty (as they understand it) is involved. Judges tend to think that the problems of “important” people are more important than the problems of not-very-important people. This is evidenced systemically in the way that courts are organized around the financial “value” of the case and the relative status and prestige of different levels of judiciary.¹⁵⁵ It

¹⁵³ And of course judges also control how much control they will exercise in these areas, as the doctrines of standards of review are entirely judge-made. The assumptions of these doctrines are open to some question, to say the least: see *Wedekind v. Ontario* (1994), 21 O.R.(3d) 289, leave to appeal to SCC refused.

¹⁵⁴ There are no proper surveys of attitudes amongst the poverty law bar as to their impressions of how they are treated in court on issues such as appeals and judicial review in relation to social assistance issues. We have not undertaken any such surveys. However, it is certainly believed by many lawyers that they are treated more impatiently and peremptorily on such matters than private bar lawyers arguing “real” law. Interestingly, this view was expressed most strongly by lawyers who have had substantial experience both in the private bar representing monied interests and in poverty law matters. The participants in the consultation with anti-poverty groups also expressed the belief that judges do not take poverty law issues seriously.

Teresa Scassa makes a similar point in “Social Welfare and Section 7 of the *Charter*, *supra* note 98. “There is a danger, reflected for example in the contrast between the decision in *Conrad* [wherein it was held that section 7 was inapplicable, the right in issue -- of a single mother to welfare -- being characterized as primarily economic in nature] and that in *Khalik-Kareemi*, [where section 7 was found to be applicable and the right of a medical doctor to practice in the region of one’s choice as including pecuniary and non-pecuniary aspects] that recourse, not only under the *Charter*, but to the courts at all, is something limited to the privileged, not only by reason of their ability to access the courts, but also by reason of the lack of interest of the legal system in the rights and interests of those who live on the margins of poverty. This concern is highlighted by the criticism of the plaintiff expressed by Gruchy, J.:

I conclude that had Mrs. Conrad’s case been permitted to be handled in a nonadversarial fashion in accordance with established social work procedures, a much more satisfactory result might have been achieved. That did not occur, however, because Mrs. Conrad adopted a legalistic attitude toward the matter which forced the County to respond accordingly... It is my view that the welfare system was turned into some sort of an adversarial process by the parties and that approach had the effect of putting the County on the defensive rather than to allow it to co-operate in the best interests of all concerned, (at 205).”

This quote also illustrates two other concerns related to issues developed earlier in the text: the dangers of mediation ideology (here Mrs. Conrad is told she ought not to assert a legal claim, that mediation would be much preferable); and the re-enforcement of the view that the “disadvantaged” are not bearers of rights, entitled to make claims against the state (the judge here says as much).

¹⁵⁵ Preliminary results of a study of attitudes towards different kinds of judicial work amongst judges in Quebec provincial court indicate that about five out of six provincial court judges disliked small claims court rotation and considered the work demeaning to their skills and stature as judges. Only about one in six thought that the “justice” rendered in small claims court was as important as other cases. (This information was provided to the

matters a great deal what importance is attached to particular kinds of issues and cases, especially when judges are acting in a supervisory or appellate role.¹⁵⁶ And as discussed earlier, how disputants are treated by the decision-maker—whether they feel respected, their “story” heard—impacts enormously on whether they experience the process as “just”.

The class, race and gender backgrounds of the judiciary have always affected the development of legal doctrine, in ways that range from the systemic devaluation of women’s experience as uncovered through the work of feminist legal writers,¹⁵⁷ to consistently taking the side of employers against employees as evidenced in the history of labour law and workplace protection legislation, to the ways in which apparently neutral principles of the administration of justice tend to exclude and marginalize people with disabilities.¹⁵⁸ The interstitial law-making role of the judiciary in the common law system has always allowed many opportunities for political and ideological preferences to be translated into supposedly neutral, objective and ahistorical terms of legal discourse. The influence of background and political beliefs on judicial behaviour has become rather spectacularly important with the advent of the *Charter* and the political choices involved in *Charter* adjudication. To date, despite a few victories for equality seeking groups, there has been little to cheer in the judicial response to the claims of the “disadvantaged” and marginalized under the *Charter*.¹⁵⁹

Recommendations

15. Steps need to be taken to make the judiciary more inclusive and representative. It is also important to develop other criteria for appointments. The foregoing discussion suggests that these might include: a capacity to step outside oneself; a capacity to acknowledge and

authors by Roderick Macdonald, based on preliminary results of an on-going research project. The researchers have not yet concluded a study to determine whether these attitudinal differences are reflected in different outcomes.)

¹⁵⁶ For example, while there are well over one million people in families on social assistance in Ontario, in the small handful of social assistance matters ever adjudicated by a court, there is rarely any indication in the hearings themselves or in the decisions rendered that judicial decisions affect the outcome of thousands of cases.

¹⁵⁷ See, for example, Dawn Bourque, “‘Reconstructing’ The Patriarchal Nuclear Family: Recent Developments in Child Custody and Access in Canada” (1995), 10 *Canadian Journal of Law & Society* 1 who argues that the family law system has given “parental rights” claims priority over concerns about abuse and violence with devastating effect, using neutral language and familial ideology to do serious harm to women and children. In many cases where there is serious evidence of abuse (sometimes even uncontested abuse) the abuse is ignored or trivialized in decisions relating to access and to custody. The Supreme Court of Canada’s decision in *R. v. Lavallee* (1990), 55 C.C.C. 97 explicitly recognizes the importance of attending to women’s differential experience in determining whether action was taken in self-defence; on this issue see also Elizabeth Schneider, “Describing and Changing: Women’s Self-Defense Work and the Problem of Expert Testimony on Battering” (1986) 9 *Women’s Rights Law Reporter* 195. More generally, on the failure of courts to understand women’s experiences see Robin West, “The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory” (1987), 3 *Wisconsin Women’s Law Journal* 81.

¹⁵⁸ See David Lepofsky, *supra* note 63 who examines how the doctrine of open courts and its underlying assumptions can discriminate against and devalue the experiences of people with disabilities.

¹⁵⁹ See Ian Morrison, “Poverty Law and the Charter” (1990), 6 *Journal of Law and Social Policy* 1 and Martha Jackman, *supra* note 98.

move beyond one's own ethnocentrism; the ability to actively listen; and demonstrable respect of others.¹⁶⁰

16. As was done in the B.C. Law Courts Education Society's comparative justice systems project, lawyers, judges, other decision-makers or "neutrals", and administrative personnel should receive training in how to relate across difference without resorting to stereotyping and without discrimination.

(c) ADMINISTRATIVE PERSONNEL

Finally, it is important not to forget the role played by the other staff of the civil justice system; the office staff of courts and tribunals. The extent to which such administrative personnel are allowed by rules to assist participants, have the ability and resources to provide both legal and non-legal information and referrals; and the manner in which they interact with those seeking assistance all act as powerful filters in the transformation of experiences into legal claims or challenges.

Recommendations

17. The role of administrative personnel in the court and tribunal systems should be reviewed to determine whether their role in assisting users of the system through imparting information about the process of the forum or about substantive law might be expanded. The extent of the role which administrative personnel will be able to play in the future is tied to an issue which we raise *infra*; the strength of the monopoly which the legal profession ought to enjoy.

5. ADVOCACY AND ACCESS TO JUSTICE

We have already emphasized that while having an advocate does not guarantee justice, lack of one is unquestionably a barrier to justice. The availability of appropriate advocacy services is especially important for members of "disadvantaged groups" who, by definition, are most likely to face other barriers to access to law.¹⁶¹ This does not mean that self-help is not

¹⁶⁰ The criteria developed by the Cornish report and by the Judicial Appointments Advisory Committee are instructive. The Cornish report recommends that human rights adjudicators have a proven track record of commitment to and expertise in human rights, and a sense of integrity and independent thinking, *supra* note 53. The Judicial Appointments Advisory Committee uses, amongst others, the following criteria: high level of professional achievement in the area(s) of legal work in which the candidate has been engaged; good writing and communication skills; awareness of and interest in knowing more about the social problems which give rise to cases coming before the courts; sensitivity to changes in social values relating to criminal and family matters; absence of pomposity and authoritarian tendencies; respect for the essential dignity of all persons regardless of their circumstances; politeness and consideration for others; moral courage; patience and ability to listen; and that the provincial judiciary should be reasonably representative of the population it serves: "this requires overcoming the serious under-representation of women and several ethnic and racial minorities". Judicial Appointments Advisory Committee, "Criteria for Evaluating Candidates, Ministry of the Attorney General, Ontario.

¹⁶¹ See, for example: National Council of Welfare, *Legal Aid and the Poor* (Ottawa: Supply and Services Canada, 1995), Chapter 1, "Why Poor People Need Legal Aid", which emphasizes the intersection of disadvantage, poverty and legal needs, and the special needs of women, aboriginal people, immigrants and refugees, people with disabilities, and elderly people; Cornish Report, *supra* note 53. The importance of advocacy and problems with advocacy services in the current Ontario legal system arose frequently in the community consultations of the Fundamental Issues group of the Civil Justice Review.

important and appropriate in many circumstances. However, self-help on both an individual and community level still requires organized support in the form of legal education materials, "self-help" kits in accessible form to particular users, training and information for lay advocates, and access to legal advocacy services as a necessary backup.

Advocacy services are sometimes criticized as contributing to litigiousness, a culture of "rights and entitlements", and so on, with an implicit or explicit appeal to an image of a kinder, gentler world where disputes are settled without the intervention of law and lawyering.¹⁶² Assuming any merit to these arguments (and the accusation that we are an overly litigious society is more often made than justified), they are hollow indeed in the context of a discussion of how members of "disadvantaged groups" can have better access to the political and legal systems from which they tend to be excluded, (see our discussion of A.D.R., *supra*).

This is not a comprehensive review of all advocacy issues in the legal system. That would be a major undertaking on its own. However, the provision of advocacy services for "disadvantaged people" is in some ways the most urgent issue in this study. Advocacy services of every kind for "disadvantaged groups" and disempowered individuals are under attack. Current advocacy services are far from perfect, but their dismantling will pose even more insurmountable barriers to access to justice.

"Advocacy" is often understood simply in terms of access to a lawyer or other counsel for individual representation. Broadly understood, however, the issue of provision of advocacy services intersects and engages every issue of access to justice in this study. Organizations within which individual advocacy services are provided can also be sites for systemic advocacy in both the political and legal arenas; in other words, they offer the potential for the provision of legal services in a manner responsive to the needs of "disadvantaged groups", (see the discussion *supra* of lawyering). The important role of advocacy groups in the production and dissemination of information about laws in ways sensitive to particular communities and the special needs of members of "disadvantaged groups" we highlighted earlier. Below, we discuss both individual representation and the provision of advocacy in a broader sense.

We have already discussed the ways in which the unrepresentative nature of the legal profession and the traditional model of lawyering can pose barriers to access to justice for members of "disadvantaged groups". The other major barrier to access posed by legal services is cost. As virtually every commentator on these issues has emphasized, most modalities of disadvantage mean an increased risk of poverty or lower income. The problem of economic disadvantage is usually seen simply in terms of "legal aid". Legal aid has certainly been the main response to the need for advocacy services. However, the issue of the costs of legal services as a barrier to access to justice should not be reduced to legal aid alone. As discussed earlier, many people cannot qualify for legal aid and this problem will only get worse. And many people fall through the cracks of the legal aid system, as the following case illustrates: A man in rural Ontario entered into a deal with a friend to purchase some land and invested \$30,000. The deal fell apart and the former friend refused to repay the money. The man then lost his job and everything else. He applied for welfare but was refused, he was told, until he sued to recover the \$30,000. He was unable to get a legal aid certificate because of the nature

¹⁶² Arguments are made across a broad spectrum, from reactionary pretences of a (non-existent) golden age when things were settled differently, to positions incidental to the CLS movement which attack entitlement culture and attendant lawyering often as alienating. A striking example of this view is found in the decision of Gruchy, J. in *Conrad*, see Scassa, *supra* note 98.

of the action. He then went to a community legal clinic. The clinic agreed to represent him in his welfare matter but was not able to represent him in the civil proceeding as it was not within the clinic mandate. His clinic lawyer then wrote letters to all the lawyers in the county, asking one to take the case on a deferred fee or pro bono basis, pointing out that the client would almost certainly win. She even included stamped addressed envelopes for reply. The response was a tirade of abuse directed towards her, the clinic, the idea of legal aid and included threats to report her to the Law Society for her efforts.

Just as importantly, an exclusive focus on legal aid tends to remove scrutiny from those who profit most from the exclusivity of the profession and the monopoly on legal services. It has long (and often) been argued that a licensure regime (in which only those granted a licence are permitted to practice) is essential to protect the “public interest”. The link between licensing and the public interest is usually unfolded in the following manner. Law is taken to be complex and difficult, its mastery requiring much intellectual skill and study. The legal problems which arise in the lives of many persons—wrongful dismissal claims, custody disputes, criminal charges, etc.—are frequently of monumental importance. Competent advice and representation are essential in these matters for without them persons’ legal interests will not be protected. To permit those without the requisite qualifications to provide “legal” services—and to hold themselves out as being able to deliver such services—would bring grave harm to members of the public. There is much to this argument; indeed, the argument which we presented earlier regarding the importance of access to legal advice closely tracks it. But we do make two significant departures from it.

First, it is important to attend to other aspects of the “public interest”. If the monopoly on legal services which licensure ensures results in fees so astronomically high that few persons can afford them, then surely the “public” is not well served.¹⁶³ Secondly, while it is true that much of law is complex (as discussed earlier) a great deal of legal advice and assistance can be provided without the necessity of having met all of the existing pre-conditions to the granting of a license. While debates and discussions have been on-going for some time now regarding the possibility of a regulated and licensed “para-legal” profession, we think the time has come to take action in this regard and to loosen the monopoly (or near monopoly) on legal services which the legal profession currently enjoys. We note that a similar recommendation was made in the Cornish report, wherein the creation of a specialized community college course for the training of lay equality rights advocates was suggested.¹⁶⁴

It is also incumbent upon the legal profession to examine the extent of its responsibility to ensure that all members of society have access to effective legal services. Many commentators have employed a contractual analysis to argue that in return for the privileges of self-regulation and monopoly (even a “loosened” monopoly), the legal profession is obliged to ensure that members of the public have access to legal services.¹⁶⁵

¹⁶³ The Canadian Bar Association Task Force on Gender Equality, *supra* note 133 argues that the public interest also requires that access to, and mobility within, the profession, be equally accessible to all.

¹⁶⁴ Cornish Report, *supra* note 53 at 50.

¹⁶⁵ How this obligation is best realized in practice is much debated. There is an enormous literature in the United States debating the merits of mandatory *pro bono* schemes as a (or the) mechanism to discharge this obligation. In light of the current financial crisis in legal aid debates about mandatory *pro bono* are likely to become topical in Ontario in the near future.

This having been said, we now turn to an examination of legal aid. There are many reasons to be concerned about legal aid, but they are not ones identified by the *First Report*, and discussed earlier in the *costs* section. As the National Council of Welfare says, "Legal aid is in trouble everywhere in Canada".¹⁶⁶ As we write, the Ontario Legal Aid Plan is preparing for possible major cuts to civil legal aid. Serious as these cuts would have appeared even a few months ago, they pale in light of what will apparently be far more severe cuts in the future. The newly elected Ontario government has said that it will cut legal aid almost in half. Cuts of this ferocity mean more than just less access to lawyers for poor individuals: they mean less advocacy and less access to justice in every sense that we have identified in this study.

Provision of civil legal services to the marginalized is both a defining element of social citizenship and is essential to the realization of social citizenship. Moreover, legal aid cuts are not happening in a vacuum: as we have already discussed, almost every kind of state action to alleviate or overcome disadvantage is being frozen, cut back or dismantled altogether. Increasingly, access to legal aid will be a last hope of the "disadvantaged" as individuals and groups. If the fundamental civil justice review is truly concerned about access to justice for "disadvantaged people", the legal aid crisis should be a top concern.

Provision of civil legal aid in Ontario is split between a certificate or judicare program and community legal clinics. Both operate through the Ontario Legal Aid Plan, but they are relatively autonomous. Responsibility for the judicare program lies with the Legal Aid Committee of the Law Society, while clinics are supervised by the Clinic Funding Committee of the Law Society. The judicare plan provides representation through private bar lawyers, mostly in "traditional" areas of legal practice (criminal law, family law and ordinary civil litigation). In the past, legal aid certificates have also been granted on a discretionary basis for some matters of special concern to members of disadvantaged groups: social assistance appeals, workers' compensation claims, landlord and tenant proceedings, etc. To this extent the certificate system overlaps with services provided by community legal clinics.

The judicare model has been extensively criticized for its limitations as a response to the legal concerns and needs of the "disadvantaged".¹⁶⁷ Most legal aid funding is devoted to criminal law, which is largely irrelevant to the daily legal concerns of most poor and "disadvantaged people". The main legal concerns of poor women, people with disabilities, people suffering discrimination and employment problems, etc., are all under-funded in comparison.¹⁶⁸ Furthermore, being based on the private practice model of lawyering, judicare

¹⁶⁶ *Legal Aid and the Poor*, *supra* note 161 at 1. Indeed, the "legal aid crisis" is international and the problems are similar in many different countries: see Thurtell and Smith, "Desperately Seeking Sustenance: Where to Now?" (1993), 9 *Journal of Law & Social Policy* 258. The U.S. Legal Services Corporation, which suffered severe cutbacks during the 1980s, is now at risk of complete dismantlement: *Federal Funding For Legal Services Update* (May 30, 1995), see materials distributed at the Annual Meeting of the Law and Society Conference, Toronto, June 1-4, 1995.

¹⁶⁷ The most recent and accessible critique of judicare programs is *Legal Aid and The Poor*, *supra* note 163. Predictably, its criticisms aroused a storm of protest from judicare administrators, particularly around its claims about relative cost-effectiveness. Nevertheless, most of its specific analysis of the legal needs of "disadvantaged" groups and why alternative delivery methods are better suited to achieve them is difficult to challenge.

¹⁶⁸ For a discussion of the gender imbalances see the *Report of the Family Law Tariff Review Sub-Committee*, (Toronto: Law Society of Upper Canada, June 1992) which documents the disparities between the family law legal aid tariff and the criminal law tariff, and the overall disproportionate amount of legal aid dollars which go to the representation of criminal defendants (mostly male, family law certificates are issued mainly to women); and Mary

incorporates the limitations and barriers of that model (discussed *supra* under the heading of "Lawyers and Other Advocates"), and generally is not an organizational vehicle for any kind of sustained advocacy on behalf of "disadvantaged groups".¹⁶⁹ (Although we should note that the Ontario system does provide limited funding for "test cases".¹⁷⁰)

However, even for the provision of traditional law services, the judicare system is in serious trouble. Civil litigation is generally underfunded and unattractive to most lawyers. There is already a near crisis in family law, the major area of civil legal aid; even if a certificate is issued it is difficult to find a lawyer who will undertake representation at legal aid rates and the number of experienced litigators who will do so is small indeed.¹⁷¹ It seems clear that this situation will only get worse.

The other component of the legal aid system is the community legal clinic program, established in the 1970s and now operating over 70 clinics in various parts of Ontario. Community legal clinics have a different and broader mandate which includes, but goes beyond, individual representation. Clinics generally do not provide representation in substantive civil law areas covered by the certificate program (family law, contract and tort litigation, etc.), focusing instead on what is often called "poverty law" practice, i.e., housing law issues, income maintenance programs (social assistance, unemployment insurance, workers' compensation, etc.). As noted, there has in the past been some overlap between the two programs because of the discretionary power to grant legal aid certificates in "poverty law" areas.

Most clinics are "general service" clinics, whose services are only available to people who live in a defined geographical areas, and whose mandate includes a range of "poverty law" services. A few clinics specialize either in particular areas of law (workers' compensation, housing, pay equity) or particular client groups (persons with disabilities, particular ethno-cultural groups, etc.). One clinic (C.L.E.O.—described in recommendation 1) is solely devoted to the production of public legal education materials aimed at low income individuals and communities. Although most clinics receive all of their funding from the Ontario Legal

Jane Mossman, "Shoulder to Shoulder, Gender and Access to Justice" (1990), 10 Windsor Yearbook of Access to Justice 351 and Ruth Carey, "'Useless' (UOSLAS) v. The Bar: The Struggles of the Ottawa Student Clinic to Represent Battered Women" (1992), 8 Journal of Law and Social Policy 55, both of whom note how the current organization and delivery of publicly-funded legal services, and even our conceptualization of who requires legal assistance and for what purposes, favour men. See also Mary Jane Mossman, "Gender Equality and Legal Aid Services: A Research Agenda for Institutional Change" (1993), 15 Sydney Law Review 30.

¹⁶⁹ For an extensive recent treatment of competing definitions of legal needs and methodologies of needs assessments, which explores the capacity of different concepts of needs to respond to gender and other modes of economic and social disadvantage, see Mary Jane Mossman, "Toward a Comprehensive Legal Aid Program in Canada: Exploring the Issues" (1993), 4 Windsor Review of Legal and Social Issues 1.

¹⁷⁰ The "test case" committee is a sub-committee of the Legal Aid committee. According to guidelines adopted June 10, 1985 and still in use, the Committee considers a range of criteria including the financial situation of the individual or group applicant, the novelty of the claim, the significance of the issue, the likelihood of success, whether the benefit of success would flow to many others, etc. This is a valuable program but is limited to litigation: it does not of itself foster sustained advocacy, being based on assessment of individual test cases and not directed at longer range litigation strategies.

¹⁷¹ *Report of the Family Law Tariff Review Sub-Committee*, *supra* note 168. A survey conducted in 1990 "found that nearly 20% of family law clients in Metro Toronto contacted more than three lawyers before they could find **anyone** who was willing to accept their case, let alone a lawyer who had expertise in family law" (at 9).

Aid Plan, all are independently incorporated under the direction of community boards of directors.

The community legal clinic program, much more than the judicare system, is specifically directed at the legal needs of disadvantaged groups and individuals. The substantive law areas in which clinics offer service tend to map onto the contours of the welfare state. Most general service clinic casework is in respect of income maintenance programs and housing issues, and immigration law in major urban centres. Some clinics operate as part of multi-service centres, where legal services are available along with other specialized social services. At least one clinic actually has a social worker as part of its permanent staff and it is claimed that this allows for a unique service that is highly respected in the community.¹⁷²

Specialty clinics are more specifically directed at discrete aspects of disadvantage and systemic responses. The arguments for specialized clinics have been recently summarized by Harry Arthurs as follows:

[C]linics can often do what other providers of advocacy cannot: they are able to offer a systemic critique which is informed by the special experience and point of view of their clientele. Clinics lawyers are unlike most other advocates involved in the field: they gain insights into the system by representing large numbers of clients in one specific field of law on an ongoing basis; research and issue advocacy are part of their job descriptions; they work closely with client communities, and are often accountable to client-dominated management boards; they are somewhat insulated from the effects of ongoing business and social relationships which may compromise the independence of other actors; and, being salaried, they tend to have a limited financial stake in moving law in one particular direction.¹⁷³

None of this is to suggest that the community clinic system does not have shortcomings and problems which affect the extent to which the clinical model delivers or facilitates "access to justice". There are also many gaps in our knowledge of the workings of the clinic system. As with many other important issues that we touch on briefly in this paper, we are unable even to begin a proper critical assessment of both the theory and practice of clinical legal services delivery.¹⁷⁴ Nevertheless, the Ontario system is unique and has been justly complimented for its ability to provide advocacy services specific to the needs of "disadvantaged groups". Public legal education, community development and systemic law reform activities are as important components of clinical services as individual representation before courts and tribunals.¹⁷⁵ Clinics rely extensively on the services of paralegals ("community legal workers" or CLWs) both for individual casework and for community organizing practices. The National Council of Welfare has argued that the community legal clinic model is the most successful and innovative model for meeting the special legal needs of poor people and members of "disadvantaged

¹⁷² *Enhancing Access to Legal Services: Impact of A Law Clinic* (1985: Legal Assistance of Windsor)

¹⁷³ H. Arthurs, *Advocacy and Dispute Resolution: A Study For the Automobile Insurance Review* (1993) at 24.

¹⁷⁴ There is a small body of Canadian literature on the clinic model of legal services, but in general this topic has not received the same degree of critical self-examination as, for example, clinical legal services in the United States.

¹⁷⁵ Section 4(2) of the Legal Aid regulation, under the *Legal Aid Act* expressly refers to activities designed "to promote the legal welfare of a community".

groups", because clinics are able to expand the paradigm of legal services beyond that of traditional lawyering.¹⁷⁶

While it does not appear at this point that the community clinic system is at risk of disappearing altogether in the current legal aid crisis, there is a very considerable risk that a combination of drastic cuts to civil legal aid and operating cuts to community clinics along with broader civil law responsibilities would effectively eliminate clinics' ability to carry out their broader mandates of public legal education, systemic advocacy and law reform. This would seriously impair the ability of "disadvantaged individuals and groups" to obtain access to justice in Ontario.

We have argued throughout that real access to justice for "disadvantaged groups" goes beyond removing barriers to individual participation in legal dispute resolution, and includes a meaningful ability for those who are excluded from the centres of political and economic power to press systemic claims for equality and against discrimination. Cost is a major barrier to doing so: researching and preparing equality claims is an extraordinary burden for those who are already economically disadvantaged. This problem was recognized by the federal government in the early years of the *Charter of Rights* with funding of the Court Challenges Program, which has achieved international recognition. However, the Court Challenges Program is of very limited value to most "disadvantaged groups" as it only funds cases involving matters under federal jurisdiction. It has always been the case that most laws of greatest immediate concern to "disadvantaged groups" have been under provincial jurisdiction and this is becoming daily more so, as the federal government engages in its wholesale off-loading of social welfare matters to the provinces. Groups have argued for years that funding similar to the Court Challenges program should be extended to matters under provincial jurisdiction. This argument was taken up by the B.C. Justice Reform Committee in its 1988 Report.¹⁷⁷

The actual costs of the federal Court Challenges program are very small, compared to the costs of most other significant justice initiatives and the costs of legal aid, while the "seed money" it provides for case development is very important. We recommend that Ontario implement a similar program.

A picture of the advocacy landscape must include a broad miscellany of organizations and groups that engage in both individual advocacy within the administrative state and systemic advocacy on the local, provincial and sometimes even the national levels. Some of this advocacy is institutionalized and specialized, such as the advisory bureaus for workers (and employers) set up within the Ministry of Labour to provide advice and representation in workers' compensation matters, patient advocates within the mental health system, and so on.¹⁷⁸ However, these are only part of the broader picture. As the National Council of Welfare points out, important sites of advocacy for "disadvantaged individuals and groups" include shelters for abused women, women's centres, anti-poverty organizations, native organizations,

¹⁷⁶ See "Desperately Seeking Sustenance", *supra* note 166.

¹⁷⁷ *Access to Justice: The Report of the Justice Reform Committee*, *supra* note 35 at 197, Recommendation 147.

¹⁷⁸ The province was about to considerably extend organized advocacy services to vulnerable people under the 1994 *Advocacy Act*. However, the future of this service is now in considerable doubt, as the newly elected provincial government has stated its intention to scrap this legislation and the Advocacy Commission, which never became fully operational.

seniors' groups, agencies working in criminal justice and many more.¹⁷⁹ There are also organizations advocating on broader public interest issues (such as environmental or consumer concerns) which are of special concern to some "disadvantaged groups". Many of these organizations have some degree of state funding (and regulation). The work of many of these groups complements and informs legal advocacy.

We agree with Timothy Agg and the National Council of Welfare that these advocacy resources can be made more stable and the quality of their services improved by creating more formal links to legal services.¹⁸⁰ In Ontario these links exist in some cases between community legal clinics and other local advocacy groups. However, there is no formal connection and actual relations are haphazard. Again, many of these organizations and agencies are now struggling for survival. Most are now facing major funding cuts, while some are facing complete defunding.

In sum, while the Civil Justice Review is not specifically a review of advocacy services and presumably will not be examining these services and alternative service models in detail, we must reiterate that without adequate, appropriate and accessible advocacy services, there will be no real hopes of access to civil justice by members of "disadvantaged groups". At the time of writing it seems clear not only that there will be substantial cuts to legal aid funding, but that some kind of fundamental restructuring is also a given for the near future. It will be of crucial importance for "access to justice" how legal needs are identified, prioritized and funded and how services are delivered in this restructuring. We have noted that there are substantial discrepancies of outcome now in the provision of legal services. This has been analyzed most fully with respect to gender, but similiar arguments may be made with respect to all kinds of "poverty law" services and the other legal services specifically directed at conditions of disadvantage. On the other hand, it is also true that Ontario is better than many jurisdictions in the provision of legal services that take some account of other modes of disadvantage. A crucial issue then is whether provision of legal services directed at issues of most concern to women, people with disabilities, social assistance recipients, etc., will be abandoned or protected under whatever new forms of legal aid funding and administration that emerge.

Recommendations

18. Cuts to legal aid services generally must be resisted if there is to be any commitment to access to civil justice.
19. Any restructuring of legal services and reallocations must address the systemic imbalances in gender and other modes of disadvantage inherent in legal aid funding and structures.
20. Funding should be made available to equality seeking groups in the same manner as the federal Court Challenges program.

¹⁷⁹ *Legal Aid and the Poor*, *supra* note 161 at 67.

¹⁸⁰ *Legal Aid and the Poor*, *supra* note 161 citing with approval the recommendations of Timothy Agg, *Review of Legal Aid Services in British Columbia* (Victoria:1992)

21. The multiple mandate of the community clinic system to do individual casework, public legal education, community development and systemic law reform should be affirmed and protected.
22. Support services to legal advocacy should be rationalized and the possibility of increasing legal supports to non-legal aid agencies and organizations who provide legal advocacy services on behalf of disadvantaged groups should be explored with the legal aid plan.

6. PARTICIPATING IN THE SHAPING OF LEGAL NORMS, COLLECTIVE ACTION

As argued earlier, access to justice for “disadvantaged groups” goes beyond removing barriers to individual participation in legal dispute resolution and includes meaningful opportunities to press systemic claims for equality and against discrimination, and more generally, to influence the evolution of legal norms and public policy. This includes participation not only in *Charter* litigation but in the most paradigmatic of “private” disputes where the matters in issue raise questions of fundamental importance to members of “disadvantaged groups” and in many of the processes of the regulatory state.

The central importance of the participation of “disadvantaged groups”, particularly in the shaping of equality norms, is well-captured by Elizabeth Shilton;

[m]any of the reforms and social programmes equality seekers have achieved by using other strategies available in the political process have been and are currently being challenged under the Charter... the women’s movement cannot afford to let these cases, many of them involving governmental initiatives crucial to the status of disadvantaged groups, be decided without attempting to ensure that the equality values at stake are fully recognized, and that the impact of the developing jurisprudence on the interests of disadvantaged groups is fully understood and taken into account in the decision-making process.¹⁸¹

Valiante and Bogart have argued that the effective participation of diverse interests in administrative decision-making can be supported on the basis of fairness, improved quality of decisions, accountability and legitimacy. The Ontario Law Reform Commission in its 1988 report on standing makes a similar observation with respect to intervention generally. “Intervention can promote better informed, and more acceptable, satisfactory decision-making, by ensuring that the court is fully armed with all relevant information and viewpoints from a spectrum of implicated interests. Intervention can be an effective mechanism for ensuring pluralistic participation, providing the court with an opportunity for a fuller appreciation of the consequences of the questions before it, and of the broader impact of the principles it is about

¹⁸¹ Elizabeth L. Shilton, “Charter Litigation and the Policy Processes of Government: A Public Interest Perspective” (1992), 30 Osgoode Hall Law Journal 653 at 655. It is also important to note that who ought to speak for particular “disadvantaged groups”, and indeed whether anything at all can be said about the group’s interests given the diversity of members of the group, are matters of considerable controversy. So, for example, many women’s organizations have been soundly criticized by racial minority women, lesbians, and poor women for speech and actions which, while undertaken in the name of all women, fail to respect their needs, interests, etc.; the nub of the complaint is that a commonality of interests and objectives among all women has been assumed where none in fact exists.

to shape.”¹⁸² But as Valiante and Bogart emphasize, a pre-condition to effective participation is adequate funding; without funding many interests will go unrepresented and policy will be shaped largely in the interests of those who are already well-resourced and powerful.¹⁸³

While costs are clearly a significant barrier to group participation, the law with respect to standing and intervention also has important implications for the nature and quality of participation before a variety of forums. Standing and intervention are “both means of broadening access to the courts and a mechanism by which an interest group can use the legal system to effect change.”¹⁸⁴ It is to these three issues—standing, intervention and costs—to which we now turn.

(a) STANDING

Traditionally status to sue (standing) was granted only where the claimant seeking standing could point to an alleged infringement of a direct, pecuniary or proprietary interest, (and of course, a legal cause of action). Based in the law of public nuisance, “[t]he basic rule which developed is that suits to redress infringement of public rights [originally related to public nuisance but over time extended to other contexts in which public rights or the public interest was implicated] are a matter for the Attorney General to enforce. The Attorney General may enforce the rights in two ways: either he [sic] initiates and prosecutes the action himself or he permits some private individual or public authority to bring a relator action which is an action in the name of the Attorney General “on the relation of” that private individual or public authority.”¹⁸⁵ The only exception to this was that an individual could maintain an action if he or she could demonstrate that, notwithstanding a diffuse harm or interest, either his or her private right was infringed or he or she had suffered special damage.

The requirement to demonstrate a direct pecuniary or proprietary interest has resulted in what Sheila McIntyre has described as a “two-tiered framework of access to justice which privileges individual over collective rights”.¹⁸⁶ W.A. Bogart similarly characterizes this requirement as, “protection of an individualism epitomized by protection of pecuniary or proprietary rights and, conversely, an abhorrence of an undifferentiated “public” ready to storm the courts and insist upon recognition of—what? This question the courts did not answer,

¹⁸² Ontario Law Reform Commission, *Report on the Law of Standing* (Toronto: Ministry of the Attorney General, 198) at 112.

¹⁸³ Marcia Valiante and W.A. Bogart, “Helping “Concerned Volunteers Working Out of Their Kitchens”: Funding Citizen Participation in Administrative Decision-Making” (1993), 31 Osgoode Hall Law Journal 687.

¹⁸⁴ Sharon Levine, “Advocating Values: Public Interest Intervention in *Charter* Litigation”, 2 N.J.C.L. 27 at 30-31.

¹⁸⁵ William A. Bogart, “Developments in the Canadian Law of Standing” (1984), 3 Civil Justice Quarterly 339 at 340.

¹⁸⁶ Sheila McIntyre, “Above and Beyond Equality Rights: Canadian Council of Churches v. The Queen” (1992), 12 Windsor Yearbook of Access to Justice 293 at 305. Levine also notes that pursuant to the traditional model of intervention, rights of the individual were vindicated, and participation by those whose rights were not directly affected was precluded. See Levine, *supra* note 184 at 30.

content to rest assured that interests which could not be characterized in a conventional way should not have a voice.”¹⁸⁷

In a series of Supreme Court decisions, first called the trilogy¹⁸⁸, later augmented to a quartet¹⁸⁹, the circumstances in which an individual could bring an action in the public interest were enlarged; in the trilogy the circumstances were expanded in which individuals would be granted standing to challenge the constitutionality of government action, and in the fourth case, *Finlay*, to challenge government compliance with statutory authority. In the third case of the trilogy, *Minister of Justice of Canada v. Borowski*, the Supreme Court of Canada articulated the test for the granting of public interest standing in constitutional cases; if there is a serious issue as to the validity of the challenged legislation, “a person need only to show that he [sic] is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court.”¹⁹⁰ As made clear in *Borowski* (and later re-enforced in *Canadian Council of Churches*¹⁹¹), a private law model of adjudication and the individual rights to which it gives primacy, remain firmly ensconced by the preference for those “directly affected”.

As Sheila McIntyre argues, “[a]ny leg of the test allows judges to rationalize the denial of standing to litigants whose access to court they do not favour or whose claims they do not understand or cannot categorize by reference to established legal constructs.”¹⁹² And as our earlier discussion suggests, instances of lack of favour and understanding are likely to be many. The Law Reform Commission in its work on standing expressed a similar concern. It also pointed to several other concerns with the law of standing: there is no coherent law of standing (it varies depending upon the type of case); the scope of the “public interest” exception with respect to administrative action is unclear post-*Finlay*; the continued application of the public nuisance rule in areas other than those carved out by the quartet (which is, as noted, less than clear) precludes, inappropriately, individuals from seeking redress for diffuse harms and public rights; and the assumption underpinning the public nuisance rule that the Attorney General is the guardian of the public interest is problematic not only because conflicts of interest are rife where the constitutionality or legality of government action is in issue but

¹⁸⁷ William A. Bogart, “The Lessons of Liberalized Standing?” (1988), 27 Osgoode Hall Law Journal 195 at 195 and cited in McIntyre, *supra* note 186 at 306.

¹⁸⁸ *Thorson v. A.G. of Canada (No.2)* (1974), 43 D.L.R. (3d) 1 (S.C.C.); *Nova Scotia Board of Censors v. McNeil* (1975), 55 D.L.R. (3d) 632 (S.C.C.); and *Minister of Justice Canada v. Borowski* (1981), 130 D.L.R. (3d) 588 (S.C.C.).

¹⁸⁹ *Minister of Finance Canada v. Finlay*, [1986] 2 S.C.R. 608.

¹⁹⁰ McIntyre characterizes the test as creating a new tier in the hierarchy of access to justice; “[a]fter individuals asserting traditional private legal rights come individuals claiming direct harm traceable to unconstitutional government. Only where the courts are persuaded that no such directly affected litigant may reasonably be expected to come forward at some point in time, will the genuinely concerned spokesperson for the collective right to constitutional government be granted standing.” McIntyre, *supra* note 186 at 307.

¹⁹¹ *Canadian Council of Churches v. The Queen et al.* (1992), 88 D.L.R. (4th) 193.

¹⁹² McIntyre, *supra* note 186 at 309.

because there is no single, monolithic public interest (a point which is also relevant to our discussion of intervention).¹⁹³

Recognizing the potential impact of the broad discretionary power in the granting of standing, it was argued in the *Canadian Council of Churches* case that this discretionary power was limited by the *Charter*, in particular that public interest standing ought to be determined in light of section 15 of the *Charter*.¹⁹⁴ Reading the court's decision, one would never know that this issue was central to the arguments made before the court. The only observation made in this respect at all by the court is that the "Constitution Act 1982 does not, of course, affect the discretion courts possess to grant standing to public litigants".¹⁹⁵ As McIntyre argues,

...by assuming constitutionally unfettered control over access to the courts where collective "public" rights are asserted, the decision ensures that courts which do not want to engage s.15 will not have to... The only equality cases it need entertain are those initiated by individuals pursuing their personal non-discrimination rights. At best, this leaves to the private litigant the choice whether and how to address the group and systemic impact of the law challenged and the remedy sought. At worst, it may put systemic discrimination created by law and compound equality claims beyond detection and cure."¹⁹⁶

Other aspects of the decision are also troubling from the vantage point of access to justice for "disadvantaged groups". The Canadian Council of Churches (C.C.C.) had brought an action to challenge amendments to the *Immigration Act*.¹⁹⁷ As noted in the decision, the C.C.C. "enjoys the highest possible reputation and has demonstrated a real and continuing interest in the problems of refugees and immigrants".¹⁹⁸ As such, the court found that the plaintiff had demonstrated a real and genuine interest. The court was also prepared to accept that the statement of claim raised serious issues as to the validity of the legislation. However, standing was denied on the basis that other reasonable and effective ways to bring the issue before the court existed. In particular, the court held that directly affected refugee claimants could bring an action to challenge the legislation.¹⁹⁹ And consistent with the court's earlier decisions, those directly affected were to be preferred thus maintaining a preference for the private over the public. An appreciation of the multitude of barriers to bringing a constitutional challenge that arise from the disadvantaged position of refugee claimants is absent in the

¹⁹³ Ontario Law Reform Commission, *Report on Standing*, *supra* note 182.

¹⁹⁴ McIntyre, *supra* note 186 at 301. As described by McIntyre the issue put before the court was "whether pre-*Charter*, judge-made rules of standing which disproportionately exclude historically disadvantaged individuals and groups from challenging laws that abridge their constitutional rights respect the rule of law."

¹⁹⁵ *Canadian Council of Churches*, *supra* note 191 at 202.

¹⁹⁶ McIntyre, *supra* note 186 at 302.

¹⁹⁷ *An Act to Amend the Immigration Act, 1976 and to Amend other Acts in Consequence Thereof*, S.C. 1988, c.35 and *An Act to Amend the Immigration Act, 1976 and the Criminal Code in Consequence Thereof*, S.C. 1988, c.36

¹⁹⁸ *Canadian Council of Churches*, *supra* 191 at 205.

¹⁹⁹ *Ibid* at 205-07.

judgement.²⁰⁰ So too is an appreciation of the data presented to the court that “disadvantaged individuals represent only a tiny minority of the private litigants who have invoked s.15.”²⁰¹

The court’s statement of its role is also troubling;

It is essential that a balance be struck between ensuring access to the courts and preserving judicial resources. It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the proliferation of marginal or redundant suits brought by well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants.²⁰²

Here too, McIntyre’s comments are trenchant;

Now, it must be underlined that what is trivialized as a “cause” here is the assertion of constitutional rights; in the case at issue, the right to fundamental justice where life, liberty or security of the person are placed at risk by government laws, and the right of society’s most “marginal” groups to have equality before and under the law and equal protection and benefit of the law. It simply will not do to justify individual litigants’ near-monopoly on court resources by caricaturing equality-seeking public interest organizations as self-absorbed amateurs ready to disrupt the real business of law.²⁰³

What the court’s decision reflects is one of the worries expressed by the Law Reform Commission (and one of the reasons for its recommendation for sweeping changes to the law of standing): that “those who do not have a traditional legal interest [would] simply be characterized as busy bodies who ought automatically to be excluded from the judicial process”.²⁰⁴

The evolving case law suggests a lack of insight into the realities of the lives of the “disadvantaged” and the barriers that they, as individual claimants, face in mounting constitutional or other systemic challenges. It also indicates a lack of appreciation of systemic or group-based harms and the role of interests groups in seeking to rectify those harms. For these reasons, radical changes in the law of standing are required.

Recommendations

23. Like the Law Reform Commission, we recommend the abolition of the current law of standing and the creation of a statutory standing rule, which amongst other things, makes clear that a personal, proprietary or pecuniary interest is neither required nor preferred. We do not here recommend the particular standing rule which ought to be in place. It

²⁰⁰ The Council argued that few refugees are likely to mount constitutional challenges due to the multiple disadvantages they experience: “lack of financial resources to bring suit or fund the evidentiary base for a public interest challenge, lack of familiarity with or trust in law, language barriers, past trauma and present dislocation, fear of authorities and of antagonizing a government on whom their families’ future welfare may depend, fear of publicity potentially harmful to relatives still residing in the country they have fled, reluctance to air publicly prior physical or sexual violation, a disabling sense of powerlessness”, McIntyre, *supra* note 186 at 307-08 referencing the appellant’s factum at paragraph 56.

²⁰¹ McIntyre, *supra* note 186 at 316.

²⁰² *Canadian Council of Churches*, *supra* note 191 at 204.

²⁰³ McIntyre, *supra* note 186 at 315.

²⁰⁴ Ontario Law Reform Commission, *Report on the Law of Standing*, *supra* note 182 at 76.

would be appropriate to build on the excellent work already done by the Law Reform Commission in this area, taking into account in particular the arguments advanced in the *Canadian Council of Churches*.

(b) INTERVENTION

Traditionally intervention, like standing, turned upon the possession of a direct pecuniary or proprietary interest and the only status for the intervenor was that of a full party. More recently, the rule with respect to intervention before the superior courts in Ontario has been liberalized and two categories of intervention created: intervention as a party; and intervention as a friend of the court to render assistance by way of argument.²⁰⁵ The rule governing intervention as a party moves beyond the language of direct pecuniary or proprietary interests to speak of "an interest in the subject matter"; a person "adversely affected by a judgment in the proceeding"; or where there are common questions of law or fact.

Perhaps more significantly, Rule 13 of the *Rules of Civil Procedure*²⁰⁶ now expressly recognizes a role of "friend of the court" to assist the court by way of argument. As such it creates a vehicle to get before the court multiple perspectives on issues affecting the "public interest", moving well beyond the assumption of a monolithic public interest which underpins the traditional law of standing. As McIntyre argues with respect to standing, "treating the directly affected citizen pursuing his or her immediate self-interest as the preferred proxy for "the" public interest in constitutional government is questionable."²⁰⁷ She goes on, quoting Bogart, "[i]t is no answer to say that these other interests will necessarily be represented as those most traditionally affected fight to vindicate their injuries. Sometimes they will but sometimes they will not. An attractive offer of settlement can make all issues disappear. Even if the matter is fully litigated, those most traditionally affected will understandably pick and choose and mould the facts and issues to present the case in the way best suited to their self-interested viewpoint."²⁰⁸ In other words, just as courts cannot rely on the Attorney-General to speak for the public interest, because there are multiple perspectives on what the public interest requires, so too an individual or group litigant cannot speak for "the" public interest.

As the Law Reform Commission noted in its report on the law of standing, Rule 13 is open to a liberalized interpretation which would permit the voicing of multiple, non-traditional legal interests in appropriate cases. Without having undertaken an exhaustive review of the cases decided under Rule 13, it appears that the interpretive trend is in this direction.²⁰⁹ One cannot

²⁰⁵ See Rule 13 of the *Rules of Civil Procedure* R.R.O., Reg. 194.

²⁰⁶ *Ibid.*

²⁰⁷ McIntyre, *supra* note 186 at 307.

²⁰⁸ McIntyre, *supra* note 186 at 307-8. While it may be the case that interest groups will present a greater diversity of views this is not necessarily the case. Interest groups too are motivated to select those facts and arguments which best promote the interests of the group as defined by its membership, or by its leadership. It may well be the case, as suggested by the introductory section of the text and in the discussion of legal information, that the interests of some members of the group conflict with those of other members.

²⁰⁹ See for example, *Re Adler et al. and The Queen in right of Ontario et al.* (1992), 88 D.L.R. (4th) 632 (Ontario Court, Gen. Div.). Levine notes a similar shift at the Supreme Court of Canada: in the last 5 years, the Court has

be overly sanguine about this trend, since it remains clear that certain interests continue—in large part because of cost factors—to be excluded.²¹⁰

Recommendations

24. The case law under Rule 13 ought to be reviewed to ensure that there exists a liberalized approach to the granting of intervenor status. If necessary, changes to the Rule ought to be undertaken.

(c) COSTS

As we discussed earlier, the costs of researching and preparing equality and other public interest litigation is an extraordinary burden for those who are already “disadvantaged”. Frequently added to this cost burden are the costs of defending motions challenging standing—cases like *Canadian Council of Churches* or *Finlay* which are litigated all the way to the Supreme Court of Canada on the question of standing are tremendously expensive; even responding to a challenge to one’s standing at a single level of court is expensive. For “disadvantaged individuals and groups”, having to fight standing issues may well mean that one never gets to the merits of the case. When the risk of having to pick up the costs of one’s adversary are added to the picture, the financial barriers to mounting such litigation are insurmountable for most “disadvantaged groups” and persons most of the time.

There are not only questions of how these costs ought to be paid but also questions of how they are incurred. With respect to this latter issue, the role of government as litigant is particularly relevant, and frequently problematic. In what circumstances is it appropriate for government as litigant to challenge the standing of the plaintiff or applicant? In what circumstances ought it to concede the unconstitutionality of impugned legislation? While the following comments were made specifically about litigation against the federal government, much of what is described also reflects the experiences of many public interest groups involved in litigation against the provincial government.

At that symposium [June 1991 Women, Law and the Administration of Justice, hosted by The Honourable Kim Campbell], it was the consensus of equality-seeking groups involved in litigation against the federal government that government’s record in dealing with *Charter* issues, which had entered the court system, was disgraceful. There is little evidence that litigation of this sort is ever seen as a trigger for policy review. There is no sense of special governmental responsibility for fostering and promoting *Charter* rights invoked through litigation. There is no discernible attempt to spare the purses of public interest groups by making voluntary disclosures, limiting discoveries, or consolidating issues. To speak directly from LEAF’s experience, the federal government’s litigation style is comparable to that of any long-pursed, cut-throat corporation hoping to bankrupt the opposition before the case ever gets to trial....If disadvantaged groups must look to government both to implement programmes to promote and realize *Charter* equality values, and then to defend those programmes in the courts from challenges based on notions of formal equality, amongst other attacks, there is a very high premium on proper legislative drafting, on proper creation of legislative

granted 70 of 76 applications. Levine concludes that the nature and degree of participation of interest groups has expanded tremendously. See Levine, *supra* note 184 at 43.

²¹⁰ Levine’s article provides a list of the public interest groups granted intervenor status before the Supreme Court of Canada; here too there are many “repeat players” and obviously a great many interests, and perspectives on issues which are not represented. Levine, *supra* note 184.

history leaving no room for doubt about legislative intent to promote equality, and ultimately, on proper litigation strategies to defend legislation against attack.²¹¹

Recommendations

25. Mechanisms which would protect persons or organizations who initiate "public interest" litigation from having costs awarded against them ought to be considered. In this respect consideration might be given to the rule contemplated by the Ontario Law Reform Commission in its report on standing.²¹² In addition mechanisms to fund litigation must be in place. To this end, as recommended previously, a provincial program similar to the federal Court Challenges program ought to be created. Consideration should be given to a program that is more extensive than the Court Challenges program, and which would also fund non-*Charter* but important public interest cases, and which would also fund interventions.
26. Broad strategies for the funding of interventions before various regulatory bodies ought to be developed and implemented, building on the experience and evaluation of the *Intervenor Funding Project Act*.²¹³
27. The role of the government as litigant in "public interest" litigation ought to be thoroughly canvassed with a view to developing guidelines which will ensure, as far as possible, that the substantive matters in issue are adjudicated as expeditiously and inexpensively as possible. Issues that ought to be addressed include, in what circumstances is it appropriate for the government as litigant to challenge the standing of the plaintiff or applicant, and in what circumstances ought the government to concede the unconstitutionality of impugned legislation?

7. ABORIGINAL PERSONS

We include here a separate section on aboriginal persons and the civil justice system for several reasons: first, any discussion of access to civil justice for aboriginal persons surely must take into consideration the right of aboriginal persons to self-government, including the right to a separate justice system; secondly, as briefly mentioned earlier, considerations of process take on a different complexion in relation to aboriginal persons; and finally, because aboriginal persons are the most marginalized and disadvantaged of all persons living in Canada, should they seek to access our civil courts (and there are many compelling reasons why they do not) they face formidable barriers.

²¹¹ Shilton, *supra* note 181 at 656 & 568-9. Andrew Roman also argues that the bottomless pocket of the Crown law office means that its litigators are less willing to settle or to concede anything, and that the corporate culture of the Crown law office is one of fighting tooth and nail. See Roman, *supra* note 10 at 191.

²¹² See the draft rule proposed by the Ontario Law Reform Commission, *Report on Standing*, *supra* note 182 at 184-5.

²¹³ See the *Intervenor Funding Project Act*, 1988, S.O.1988, c. 71 and W.A.Bogart & M.Valiante, *Access and Impact: An Evaluation of the Intervenor Funding Project Act, 1988* (Toronto: Ontario Ministry of the Attorney General, 1992). The Act created a three year pilot project for the funding of intervenors before certain administrative bodies provided they satisfied a number of criteria. The pilot was extended in 1992 for a further 4 year period.

In the context of this paper it is not possible to do justice to the arguments supporting a right to self-government. Rather, we have attempted to highlight only a few considerations relevant to the Civil Justice Review and in particular to the question of access to civil justice for "disadvantaged groups". One of the forces propelling the movement towards self-government in general, and a separate justice system in particular, derives from the lack of congruity between aboriginal conceptions of "justice", aboriginal laws, and aboriginal dispute resolution processes and those embraced by the courts of the dominant culture.²¹⁴ This lack of congruity means that for many aboriginal persons, access to the civil courts for the resolution of "private" disputes will rarely be equated with a sense of either substantive or procedural justice. Thus, improving the efficiency of these courts, or even redressing the multiple barriers that aboriginal persons face in accessing these courts, will not go a long way towards improving access to civil justice for aboriginal persons. Samuel Stevens poses the following rhetorical questions;

Is it any wonder today that aboriginal people have no real confidence that the present civil court can resolve disputes between aboriginal peoples in a way that means something to them and that respects their traditional laws? Is it any wonder that aboriginal societies want to resolve their disputes according to their own dispute resolution systems and their traditional laws?²¹⁵

With respect to process, many aboriginal authors have described aboriginal dispute resolution processes as non-confrontational wherein disputes are mediated or conciliated. Indeed, in at least some aboriginal cultures, personal confrontation and accusations are to be avoided, and thus, not surprisingly, many aboriginal persons have not only experienced the adversarial system as alienating, but have been misjudged by adjudicators within that system based upon misunderstandings of differing cultural norms. A mediated or conciliated process which derives from aboriginal practices and is embedded within a cultural context that values harmony, restoration and the collectivity is a far cry from mandatory mediation annexed to the civil courts as a precondition to accessing a decision-maker. For this reason, we re-iterate that much of our earlier analysis and critique of mediation and of due process are not applicable in the context of aboriginal dispute resolution.

Finally, the barriers to accessing our civil courts for aboriginal persons are monumental. As Stevens notes, these include prohibitive costs, lack of education, lack of knowledge of rights, unfamiliarity with the justice system, lack of availability of lawyers who practice in areas where assistance is most required (Unemployment Insurance, Social Assistance, Pension benefits), geographic isolation, and language barriers (a substantial proportion of aboriginal people to not speak or read English well).²¹⁶ Consistent with many of our earlier arguments Stevens argues that aboriginal persons "need information about the justice system and about federal and provincial laws" and that this information should be provided through workshops

²¹⁴ Samuel D. Stevens, "Access to Civil Justice for Aboriginal Persons", in Hutchinson (ed.), *supra* note 51 at 203.

²¹⁵ *Ibid* 219.

²¹⁶ Stevens, *supra* note 51 at 203-212. See also Robert Milling and Renee Puskas, "Native Access to Justice: Legal Needs on the Walpole Island Indian Reserve", 1 WRLSI 34 who identify many of the same barriers and recommend many of the same solutions as Stevens. The authors use a three part definition of access to justice suggested by Rosemary McCarney in "Legal Services for Native People in Canada": access includes knowledge as to the availability of legal services, the effectiveness of legal services in meeting needs, and the cultural identification with the service so that the target group will make use of the facilities.

conducted by trained aboriginal professionals (not necessarily lawyers—he gives the example of social work students trained in law to become ready-made paralegals), and not brochures.²¹⁷ Information, he argues, also needs to be set out in a form compatible with the way of life and culture of those to whom the information is directed. He further argues that the under-representation of aboriginal lawyers and judges is a fundamental barrier since good representation and decision-making require an understanding of traditional laws of client. Stevens also notes the importance of group access to the civil justice system and the prohibitive costs of such litigation;

It is unreasonable, because of their disadvantaged economic position in society, to expect individual aboriginal people to litigate many civil suits to protect their group rights... It is therefore important that Native Law Centres be established to research and to publish on vitally important aboriginal rights and to initiate and intervene in civil litigation cases that will affect aboriginal rights.²¹⁸

Recommendations

28. Broad consultations with First Nations peoples ought to be undertaken on “access to civil justice” with a view to negotiations on separate justice systems.

8. SUMMARY OF RECOMMENDATIONS

1. We agree with the *First Report* that information about the law and legal system is an important element of access to civil justice. However, it is important that the issues of deciding what information should be created, the form and content of the information products and the modes of dissemination of information all be carried out in cooperation with community-based groups, and non-governmental agencies specializing in public legal education (an example of such an organization is Community Legal Education Ontario (C.L.E.O.), a community controlled non-profit organization funded by the Ontario Legal Aid Plan which specializes in public legal information directed at low income individuals and groups.)
2. Particularly for legal information directed at “disadvantaged groups”, it is important that information be developed in consultation with representative organizations (such as ethno-cultural organizations, literacy organizations, disability organizations, etc.) at all stages of the information creation and dissemination process. In most cases it will be preferable that primary control of the legal information process be located outside government (although government would remain responsible for funding public legal information).
3. Existing mechanisms of internal accountability within government bureaucracies responsible for programs and services should be reviewed and new mechanisms put in place to better curb illegality, bad faith administration, threats and retaliation. Consideration should be given to whether and how individual public servants should be held accountable. A complaints and sanctions process operating within an administrative scheme must be made known to clients, and there must be guarantees of confidentiality and non-retaliation, otherwise any other changes will be meaningless.

²¹⁷ Stevens, *supra* note 51 at 213-14.

²¹⁸ *Ibid* 217-18.

4. Advocacy services to challenge bad faith administration, harassment and illegality must be in place and must be adequately funded.
5. There should be established mechanisms for the coverage up-front of particular costs associated with the formal pursuit of a legal claim, through the Legal Aid Plan and through amendments to the enabling statutes or regulations for those "tribunals of everyday life" which do not currently provide for the coverage of such costs.
6. While we concur with the recommendation of the *First Report* that a working group be established in conjunction with the Law Society of Upper Canada, for the purpose of addressing the question of legal fees and making recommendations for the Final Report (Recommendation 6), we would take this further. Statutory amendments are required loosening the legal profession's monopoly on the provision of legal services as a means both to reduce the costs of legal services and as discussed, *infra* to improve the quality of those services.
7. For decision-making bodies who hear cases of a variety of sorts, a system should be established to prioritize cases based upon the principle of harm discussed above. Where the caseload of a decision-making body is largely made up of cases which ought to be heard promptly, because of the harms brought about by delay, resources and structures must be in place to ensure that they are. We recognize that the causes of delay are multiple and complex and hence, that investigation of the causes of delay must necessarily precede the re-ordering of the operations of decision-making bodies in accordance with the harm principle.
8. Consultations with disability services agencies should be undertaken to determine standards for state of the art barrier-free design. All buildings wherein institutionalized dispute resolution is housed ought to conform to such standards.
9. Together with community-based organizations, the specific needs for translation services should be identified and a model for best meeting those needs developed.
10. The translation services developed ought to be funded by the provincial government.
11. Mediation or other "alternative dispute resolution" process must never be made mandatory. Where mediation or other A.D.R. process is available, there must be a real choice as between entering that process and entering a formal adjudicatory process. This requires that where alternatives are developed attention be paid to the social and economic context of potential litigants.
12. In the preceding discussion we identified, but were unable to address within the scope of this paper, a range of questions arising out of our analysis of the due process model. These questions and issues ought to be the subject of further research and study. These include: given that the due process model has largely failed to deliver upon the promise of keeping bureaucracies in check, how might this best be accomplished?; given the inadequacy of a complaint-driven mechanism for addressing systemic discrimination, what are the alternatives?; and how is the take-up of government benefits best ensured?
13. Steps need to be taken to ensure that the legal profession becomes more inclusive and representative.

14. Models for the delivery of legal services which are attentive to the realities of the lives of disadvantaged persons must be preserved and strengthened.
15. Steps need to be taken to make the judiciary more inclusive and representative. It is also important to develop other criteria for appointments. The foregoing discussion suggests that these might include: a capacity to step outside oneself; a capacity to acknowledge and move beyond one's own ethnocentrism; the ability to actively listen; and demonstrable respect of others.
16. As was done in the B.C. Law Courts Education Society's comparative justice systems project, lawyers, judges, other decision-makers or "neutrals", and administrative personnel should receive training in how to relate across difference without resorting to stereotyping and without discrimination.
17. The role of administrative personnel in the court and tribunal systems should be reviewed to determine whether their role in assisting users of the system through imparting information about the process of the forum or about substantive law might be expanded. The extent of the role which administrative personnel will be able to play in the future is tied to question of the strength of the monopoly which the legal profession ought to enjoy.
18. Cuts to legal aid services generally must be resisted if there is to be any commitment to access to civil justice.
19. Any restructuring of legal services and reallocations must address the systemic imbalances in gender and other modes of disadvantage inherent in legal aid funding and structures.
20. Funding should be made available to equality seeking groups in the same manner as the federal Court Challenges program.
21. The multiple mandate of the community clinic system to do individual casework, public legal education, community development and systemic law reform should be affirmed and protected.
22. Support services to legal advocacy should be rationalized and the possibility of increasing legal supports to non-legal aid agencies and organizations who provide legal advocacy services on behalf of disadvantaged groups should be explored with the legal aid plan.
23. Like the Law Reform Commission, we recommend the abolition of the current law of standing and the creation of a statutory standing rule, which amongst other things, makes clear that a personal, proprietary or pecuniary interest is neither required nor preferred. We do not here recommend the particular standing rule which ought to be in place. It would be appropriate to build on the excellent work already done by the Law Reform Commission in this area, taking into account in particular the arguments advanced in the *Canadian Council of Churches*.
24. The case law under Rule 13 ought to be reviewed to ensure that there exists a liberalized approach to the granting of intervenor status. If necessary, changes to the Rule ought to be undertaken.
25. Mechanisms which would protect persons or organizations who initiate "public interest" litigation from having costs awarded against them ought to be considered. In this respect consideration might be given to the rule contemplated by the Ontario Law Reform

Commission in its report on standing. In addition mechanisms to fund litigation must be in place. To this end, as recommended previously, a provincial program similar to the federal Court Challenges program ought to be created. Consideration should be given to a program that is more extensive than the Court Challenges program, and which would also fund non-*Charter* but important public interest cases, and which would also fund interventions.

26. Broad strategies for the funding of interventions before various regulatory bodies ought to be developed and implemented, building on the experience and evaluation of the *Intervenor Funding Project Act*.
27. The role of the government as litigant in "public interest" litigation ought to be thoroughly canvassed with a view to developing guidelines which will ensure, as far as possible, that the substantive matters in issue are adjudicated as expeditiously and inexpensively as possible. Issues that ought to be addressed include, in what circumstances is it appropriate for the government as litigant to challenge the standing of the plaintiff or applicant? and in what circumstances ought the government to concede the unconstitutionality of impugned legislation?.
28. Broad consultations with First Nations peoples ought to be undertaken on "access to civil justice" with a view to negotiations on separate justice systems.

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